# The Madras Law Journal

EDITED BY


V. KRISHNASWAMI AIYAR, B.A., B.L.

P. R. SUNDARA AIYAR, B.A., B.L.

P. S. SIVASWAMI AIYAR, B.A., B.L.


UNIVERSITY

9

## Volume IX.

## 1899.

UNIVERSITY OF CAL
NOT TO BE REMO
DEPARTMENT OF


Published by

P. S. SIVASWAMI AIYAR, B.A., B.L.

45, High Court Buildings, Madras.

—:o:—

Madras.

PRINTED BY H. PLUMBE, SUPERINTENDENT, LAWRENCE ASYLUM PRESS, MOUNT ROAD.

1900.

COH-H05357-9-LP2259
9
LP22
UNIVERSITY LIBRARY LAW COLLEGE
9

# CONTENTS


| | M. L. J. Page. |
|---|---|
| **Leaders :—** | |
| Administration of Justice in Madras | 349 |
| Apology | 245 |
| Bandhus II :—*P. R. Ganapati Aiyar*, B.A., B.L. | 54 |
| ——— III :— *do.* *do.* | 147 |
| Deposit of Title Deeds :— *do.* | —— |
| Dreyfus Case | 309 |
| Frivolous and Vexatious Actions | 278 |
| Lien of Solicitors and Arbitrators and their protection from producing documents on ground of lien :—By *Madan Gopal* | 1 |
| Primogeniture among Mothers :—Jurisprudence | 275 |
| ——— in Hindu Law :— do. | 353 |
| Receiving Mother :—Jurisprudence | 229 |
| Recent Legislation | 49 |
| Sir Arthur Collins | 195 |
| Spendthrift Legislation | 207 |
| Succession of Gotrajas under the Mitakshara | 91 |
| Succession to impartible Estate :—Seniority and half blood :—Jurisprudence | 318 |
| Topics of Malabar Law :—Joint family | 135 |
| Do. :—Karnavan | 202 |
| **Translations :—** | |
| Madana Parijata :—By *S. Sitarama Sastri*, B.A. | 7,101 |
| Visvarupa's Commentary of Yajnavalkya :—By *S. Sitarama Sastri*, B.A. | 365, 416 |

**Notes of Indian Cases :—**

ALLAHABAD SERIES.

| | | |
|---|---|---|
| Bakar Sajjad *v.* Udit Narain Singh | 21 A., 361 | 373 |
| Chetan Charan Dass *v.* Baladra Dah | 21 A., 314 | 328 |
| Dharam Singh *v.* Angan Lal | 21 A., 301 | 228 |
| Dhudh Bahadur Rai *v.* Tek Narain Rai | 21 A., 251 | 285 |
| Gur Prasad *v.* Ram Lal | 21 A., 20 | 115 |
| Harlal *v.* Mahamudi | 21 A., 454 | 427 |
| Janki Prasad *v.* Sukhrani | 21 A., 274 | 285 |
| Kishan Lal *v.* Garuda Dhwija Prasad Singh | 21 A., 238 | 251 |
| Muhammad Husen *v.* Muzaffer Husen | 21 A., 22 | 115 |
| Ram Dayal *v.* Madan Mohan Lal | 21 A., 425 | 426 |

| | | M. L. J. Page. |
|---|---|---|
| Ram Nath Rai *v.* Luchman Rai ... ... ... | 21 A., 193 | 251 |
| Sibta Kunwar *v.* Bhagoli ... ... ... ... | 21 A., 196 | 251 |
| Sri Balusu Gurulingasawmi *v.* Sri Balusu Ramalakshmama | 21 A., 460 | 427 |
| Vias Ram Shankar *v.* Ralla Ram Misr ... ... ... | 21 A., 89 | 167 |
| Yad Ram *v.* Umrao Singh ... ... ... ... | 21 A., 380 | 426 |

BOMBAY SERIES.

| | | |
|---|---|---|
| Alamai *v.* Positive Government Security Life Assurance Company ... ... ... ... ... | 23 B., 191 | 247 |
| Bai Jasoda *v.* Bamangha ... ... ... ... | 23 B., 334 | 250 |
| Bai Mangul *v.* Bai Rukhmini ... ... ... ... | 23 B., 291 | 249 |
| Dhurmsey *v.* Ahmedbhai ... ... ... ... | 23 B., 15 | 214 |
| Duttaram *v.* Gangaram ... ... ... ... | 23 B., 287 | 249 |
| Empress *v.* Durand ... ... ... ... ... | 23 B., 213 | 248 |
| Fakirgauda *v.* Gangi ... ... ... ... ... | 23 B., 307 | 250 |
| Murigeya *v.* Hayet Saheb ... ... ... ... | 23 B., 237 | 248 |
| Ningarva *v.* Bharmappa ... ... ... ... | 23 B., 63 | 214 |
| Queen-Empress *v.* Raghu ... ... ... ... | 23 B., 221 | 248 |
| Raghunath Mukund *v.* Sarosh K. R. Kama ... ... | 23 B., 266 | 248 |
| Rango *v.* Mudiyeppa ... ... ... ... ... | 23 B., 296 | 250 |
| Sadashive *v.* Trimbak ... ... ... ... | 23 B., 146 | 115 |
| Shivaradruppa *v.* Balappa ... ... ... ... | 23 B., 283 | 249 |

CALCUTTA SERIES.

| | | |
|---|---|---|
| Chhato Ram *v.* Bilto Ali ... ... ... ... | 26 C., 51 | 168 |
| Hudson *v.* Bosdeo Bajpye ... ... ... ... | 26 C., 109 | 169 |
| Kameshwar Pershad *v.* Amanutulla ... ... ... | 26 C., 53 | 168 |
| Pardhan Bhukkun Lal *v.* Narsing Dyal ... ... ... | 25 C., 30 | 170 |
| Rameswar Koer *v.* Mahomed Mehddi Hossein Khan ... | 26 C., 39 | 167 |
| Sheodani Tewari *v.* Ram Saran Singh ... ... ... | 26 C., 164 | 170 |
| Shyama Charan Mundal *v.* Heras Mullah ... ... | 26 C., 160 | 169 |

MADRAS SERIES.

| | | |
|---|---|---|
| Abdul Aziz Khan Sahib *v.* Appayasami Naickar... ... | 22 M., 110 | 163 |
| Chelamayya *v.* Varadayya ... ... ... ... | 22 M., 166 | 167 |
| Dharmapuram Pandara Sannadhi *v.* Vira Pandiyam Pillai. | 22 M., 302 | 375 |
| Gowdu Magata *v.* Gowdu Bhagawan ... ... ... | 22 M., 299 | 375 |
| Groves *v.* Administrator-General of Madras ... ... | 22 M., 119 | 165 |
| Kombi Achen *v.* Kochunni ... ... ... ... | 21 M., 352 | 17 |
| Mahabala Bhatta *v.* Kunhanna Bhatta ... ... ... | 21 M., 371 | 19 |
| Maidan *v.* Janikiramayya ... .. ... ... | 21 M., 371 | 19 |
| Manicka Gramany *v.* Ramachandraiyer... ... ... | 21 M., 482 | 20 |
| Muthayya Chetti *v.* Secretary of State for India... ... | 22 M., 100 | 114 |
| Naraya Kaviraya *v.* Kundasami Goundan ... ... | 22 M., 24 | 71 |
| Queen-Empress *v.* Shree Ahobala Matam Jeer ... ... | 22 M., 47 | 27 |

| | | M. L. J. Page. |
|---|---|---|
| Ramachandra Rayaguru v. Modhu Padhi ... ... | 21 M., 326 | 16 |
| Ramasami Ayyar v. Vengidusami Ayyar ... ... | 22 M., 113 | 164 |
| Rama Sastri v. Narasimha Ayyan ... ... ... | 22 M., 30 | 375 |
| Ramayyar v. Ramayyar ... ... ... ... | 21 M., 356 | 18 |
| Rangammal v. Echammal ... ... ... ... | 22 M., 305 | 375 |
| Ratnam Ayyar v. Krishna Doss Vital Doss ... ... | 21 M., 494 | 21 |
| Robert Fischer v. Secretary of State for India in Council... | 22 M., 270 | 373 |
| Sami Pillai v. Krishnasami Chetty ... ... ... | 21 M., 417 | 20 |
| Sethurayar v. Shanmugam Pillai ... ... ... | 21 M., 353 | 17 |
| Sinaya Pillai v. Munisami Aiyan ... ... ... | 22 M., 289 | 374 |
| Srinivasaswami v. Ramanujachariar ... ... ... | 22 M., 117 | 160 |
| Sriramulu v. Ramasami ... ... ... ... | 22 M., 109 | 115 |
| Subbaraya Ravithaminda Nainar v. Ponnusami Nadar ... | 21 M., 364 | 18 |
| Subba Reddy v. Chengalamma ... ... ... | 22 M., 126 | 165 |
| Tirumal Rao v. Syed Destaghiri Miyah ... ... ... | 22 M., 286 | 374 |
| Venkatagiri Rajah v. Ramasami ... ... ... | 21 M., 413 | 19 |
| Vibhudapriya Thirthasami v. Vidianidhi Tirthasami ... | 22 M., 131 | 166 |
| Zamindar of Tuni v. Bennayya ... ... ... | 22 M., 155 | 166 |


**Summary of Recent Cases:—**

**Indian Cases—**

ALLAHABAD WEEKLY NOTES.


| | | |
|---|---|---|
| Abdul Sadiq v. Abdul Aziz ... ... | A. W. N. for '99 p. 1 | 25 |
| Badri Man v. Raju Ram ... ... ... | A. W. N. for '99 p. 22 | 126 |
| Bhagwanta v. Sukhi ... ... ... | A. W. N. for '99 p. 159 | 252 |
| Birju Rai v. Muhammad Zabir Alam ... | A. W. N. for '99 p. 18 | 24 |
| Dharam Singh v. Angan Lal ... ... | A. W. N. for '99 p. 78 | 178 |
| Dwarka Prasad v. Lachhoman Das ... ... | A. W. N. for '99 p. 67 | 175 |
| Imdad Hasan Khan v. Badri Prasad... ... | A. W. N. for '99 p. 74 | 176 |
| Ishaq Ali Khan v. Chunni ... ... ... | A. W. N. for '98 p. 214 | 24 |
| Jagawant Sing v. Silan Singh ... ... | A. W. N. for '99 p. 66 | 175 |
| Janki Prasad v. Sukhrani ... ... ... | A. W. N. for '99 p. 58 | 171 |
| Jhanday Lal. v. Sarman Lal ... ... | A. W. N. for '99 p. 61 | 175 |
| Kausalia v. Gulab Kunwar... ... ... | A. W. N. for '99 p. 72 | 176 |
| Kunj Behri Lal v. Parsotam Narain ... | A. W. N. for '98 p. 210 | 23 |
| Leladhur v. Chaterbhuj ... ... ... | A. W. N. for '99 p. 46 | 174 |
| Marshub Ahmad v. Nihal Ahmad ... ... | A. W. N. for '99 p. 55 | 171 |
| Muhammad Abdullah Khan v. Kallua ... | A. W. N. for '99 p. 19 | 24 |
| Queen-Empress v. Mahabir Tiwari ... ... | A. W. N. for '99 p. 76 | 177 |
| ———— v. Ramsaran Rai ... ... | A. W. N. for '99 p. 77 | 177 |
| ———— v. Tirumal ... ... | A. W. N. for '98 p. 208 | 23 |
| ———— v. Zakir Husen ... ... | A. W. N. for '99 p. 5 | 22 |
| Ram Dayal v. Madan Mohan Lal ... ... | A. W. N. for '99 p. 153 | 252 |
| Sheoraj Singh v. Gauri Sahari ... ... | A. W. N. for '99 p. 45 | 171 |

| | | M. L. J. Page. |
|---|---|---|
| **CALCUTTA WEEKLY NOTES.** | | |
| Bhuban Mohun Pal *v.* Raja Peary Mohun Mukerjee ... | 3 C. W. N. LXXX | 21 |
| Fink *v.* Moheraj Bahadur Sing ... ... ... | 4 C. W. N. 27 | 379 |
| Har Kumar Pal Chowdry *v.* Sheikh Asaitullah ... | 3 C. W. N. 150 | 22 |
| Maharaja Harbullabh Narain Singh Bahadur *v.* Bajrang Dass ... ... ... ... | 3 C. W. N. 149 | 21 |
| Pundit Ram Narain *v.* Maulvi Muhammad Kadi ... | 3 C. W. N. p. 113 | 25 |
| Radhanath Mukerjee *v.* Tarrucknath Mukerjee ... | 3 C. W. N. 126 | 26 |
| Shama Churn Roy *v.* Abdul Kabeer ... ... | 3 C. W. N. 158 | 22 |
| **BOMBAY PRINTED JUDGMENTS.** | | |
| Amratlal Damodardas *v.* Lallubhai Dalpatram ... | for 1898 p. 373 | 26 |
| Antaji Yeshwant Rajadhyaksh *v.* Lakshmibaikoru Balaji ... ... ... ... ... | for 1898 p. 400 | 173 |
| Gabirneal *v.* Maktambi Kom Husein ... ... | for 1898 p. 402 | 713 |
| Kesu Sivram Marwadi *v.* Genu Babaji Powar ... | for 1898 p. 374 | 26 |
| Narayan Hari Deval *v.* Keshav Shivaram Deval ... | for 1898 p. 390 | 172 |
| Rachappa Nilkanthappa *v.* Mangesh Mahadaji Sheraff | for 1898 p. 386 | 172 |
| Sayadulli valad Kasimsha *v.* Aminiba Kom Sayad Khadirsaheb ... ... ... ... | for 1898 p. 393 | 172 |
| **BOMBAY LAW REPORTER.** | | |
| Desai Bhaoorai Ranchhodrai *v.* Desai Chunilal Dhayabbhai ... ... ... ... ... | 1 B. L. R., 658 | 378 |
| Laxman Darku *v.* Narayen Laxman Khatik ... | 1 B. L. R., 777 | 376 |
| Mahomedally Moola Tyabji *v.* Johnx Campbell ... | 1 B. L. R., 739 | 376 |
| Pransukhram Dinanath *v.* Bai Ladker ... ... | 1 B. L. R., 88 | 174 |
| Shet Manibhai Premabhai *v.* Bai Shei Rupaliba ... | 1 B. L. R., 646 | 378 |
| Shivmurtepp bin Bashetappa Katti *v.* Virappa bin Shivilingappa Kavdi... ... .... ... | 1 B. L. R., 620 | 377 |
| Valubai Kom Kashinath Abaji Joshi *v.* Govind Kashinath Joshi ... ... ... ... ... | 1 B. L. R., 739 | 376 |
| Vinayek Narayen *v.* Dattatraya Krishna Datai ... | 1 B. L. R., 645 | 377 |
| Yaminnabai Kom Babaji Kavde *v.* Maunbai Kom Tatya Kavadi ... ... ... ... ... | 1 B. L. R., 95 | 174 |
| **APPEAL CASES.** | | |
| **English Cases :—** | | |
| Australasion Joint Stock Bank *v.* Bailey... ... | 1899 A. C., 396 | 432 |
| Bulli Coal Mining Company *v.* Osborne ... ... | " A. C., 351 | 430 |
| Hope *v.* Campbell ... ... ... ... | " A. C., 1 | 116 |
| New Windsor Corporation *v.* Taylor ... ... | " A. C., 41 | 117 |
| Sharp *v.* Jackson ... ... ... ... | " A. C., 419 H. L. | 333 |
| Spilsbury *v.* Regina ... ... ... ... | " A. C., 382 | 431 |
| **CHANCERY DIVISION.** | | |
| Birks, *In re* Kenyon *v.* Birks ... ... ... | 1899, I. Ch., 703 | 260 |

| | | M. L. J. Page. |
|---|---|---|
| Charter *v.* Watson | 1899, I. Ch., 175 | 184 |
| Clifford *v.* Holt | „ I. Ch., 698 | 259 |
| Cowen *v.* Truefitt | „ 2 Ch., 309 | 429 |
| Davies *v.* Parry | „ 1. Ch., 602 | 257 |
| Day *v.* Singaleton | „ 2 Ch., 320 | 426 |
| Dingle *v.* Coppen and Coppen *v.* Dingle | „ I. Ch., 336 | 220 |
| Drinegher *v.* Wood | „ I. Ch., 393 | 221 |
| Duncan, *In re* Terry *v.* Sweeting | „ I. Ch., 387 | 255 |
| E. Underwood & Son, (Limited) *v.* Barker | „ I. Ch., 300 | 219 |
| Ellis *v.* Duke of Bedford | „ I. Ch., 494 | 296 |
| Evans *v.* Merthy or Tydfil Urban Council | „ I. Ch. 241 C. A. | —— |
| Fielding *v.* Morley Corporation | „ I. Ch. 1 | 73 |
| Freeman *v* Laing | „ 2 Ch., 355 | 430 |
| Fiiaray Holroyd *v.* Henley's Breweries, (Limited). | „ I. Ch., 86 | 76 |
| G. Infants, *In re* | „ I. Ch., 719 | 260 |
| Goldstone *v.* Williams Deacon & Co. | „ I. Ch. | 47 |
| Griffin, *In re* Griffin v. Griffin | „ I. Ch., 408 | 222 |
| Hope *v.* Walter | „ I. Ch. 879 | 335 |
| Jack, *In re* Jack *v.* Jack | „ I. Ch., 374 | 227 |
| Levy *v.* Stogdon | „ I. Ch., 5 | 73 |
| McKeown *v.* Joint Stock Institute | „ I. Ch., 671 | 259 |
| Mohun *v.* Broughton | „ Ch. P. D., 211 | 331 |
| Moore Brothers & Co., (Limited), *In re* | „ I. Ch., 627 | 258 |
| Mowat, *In re* Kingston Cotton Mills Company *v.* Mowat. | „ I. Ch., 831 | 332 |
| Nourse, *In re* Hampton *v.* Nourse | „ I. Ch., 63 | 75 |
| Null *v.* Easton | „ I. Ch., 873 | 334 |
| Oliver *v.* Hinton | „ 2 Ch., 264 | 428 |
| Pemberton *v.* Hughes | „ I. Ch., 781 | 332 |
| Roberts *v.* Gwyfrai District Council | „ I. Ch., 513 | 257 |
| Sen Sen Company *v.* Britten | „ I. Ch., 692 | 259 |
| Stanley *v.* Wilde | „ I. Ch., 747 | 292 |
| Stoke Parish Council *v.* Price | „ 2 Ch., 277 | 428 |
| Tiessen *v.* Henderson | „ I. Ch., 86 | 334 |
| Trotter, Totter *v.* Trotter | „ 1. Ch., 764 | 293 |
| Wadsdale, *In re* Britton *v.* Partridge | „ I. Ch., 163 | 183 |
| Wanton *v.* Corpard | „ I. Ch., 92 | 76 |
| West *v.* Williams | „ I. Ch., 132, C. A. | 181 |
| Wrexham, *In re* Mold & Connah's Quay Railway Company | „ I. Ch. 440, C. A. | 255 |


QUEEN'S BENCH DIVISION.


| | | |
|---|---|---|
| Attorney-General *v.* Carlton Bank | 1899, II. Q. B., 158 | 379 |
| ——— *v.* London and North-Western Railway | „ I. Q. B., 72 | 29 |

| | | M. L. J. Page. |
|---|---|---|
| ——— v. Mayor, Alderman and Citizens of New Castle, upon Tyne and Hill Motum ... | 1899, II. Q. B., 478 | 384 |
| Barter v. London and County Printing Works ... | „ I. Q. B., 901 | 288 |
| Bonner v. Tottenham and Edmonten Permanent Investment Building Company ... ... | „ I. Q. B., 161, C. A. | 28 |
| Britton v. G. N. R. Company ... ... ... | „ I. Q. B. | 243 |
| Burrows v. Rhodes ... ... ... | „ I. Q. B., 816 | 286 |
| Cahux & Mayer v. Pockett's Bistol Channel Steam Packet Company, (Limited) ... ... | „ I. Q. B., 643 | 217 |
| Chandler v. Smith ... ... ... ... | „ II. Q. B., 506, C. A. | 386 |
| Cornford v. Carlton Bank, Limited ... ... | „ I. Q. B., 392 | 181 |
| Coughten v. Gillison ... ... ... ... | „ I. Q. B., 145, C. A. | 27 |
| Ellis v. Wadeson ... ... ... ... | „ I. Q. B., 714 | 254 |
| Eastern Telegraph Company v. Dt. and others ... | „ I. Q. B., 835 | 287 |
| George v. Goldsmiths and General Burglary Insurance Company, Limited ... ... ... | „ I. Q. B., 595 | 328 |
| Gieve, *In re* ... ... ... ... | „ I. Q. B., 794, | |
| Greenwood v. Francis ... ... ... | „ I. Q. B., 312, C. A. | 178 |
| Green v. Thomson ... ... ... ... | „ II. Q. B., 1 C. A. | 293 254 |
| G. W. Railway Company v. London and County Banking Company ... ... ... | „ II. Q. B., 172 | 380 |
| Hall v. Cox ... ... ... ... | „ I. Q. B | 198 |
| —— v. Snowdon Hubbard & Company ... ... | „ I. Q. B., 593, C. A. | 253 |
| Holliday v. National Telephone Company ... | „ I. Q. B., 392, C. A. | 384 |
| Higginson v. Dean, *In re* ... ... ... | „ I. Q. B., 325 | 179 |
| Hubbeck & Sons, Limited, v. Wilkinson Heywood & Claw, Limited ... ... ... | „ I. Q. B., 86, C. A. | 286 |
| Jarman v. Hale ... ... ... ... | „ I. Q. B., 994 | 289 |
| Jones v. Bienstein ... ... ... ... | „ I. Q. B., 470 | 215 |
| Marney v. Scott ... ... ... ... | „ I. Q., 986 | 288 |
| Mersey Docks v. Harbour Board ... ... | „ I. Q. B., 541 | 217 |
| Moxan v. Grant ... ... ... ... | „ I. Q. B., 480 | 216 |
| Osmond v. Mutual Cycle and Manufacturing Supply Company ... ... ... | „ II. Q. B., 488, C. A. | 386 |
| Penny v. The Wimbledon Urban District Council | „ II. Q. B., 72, C. A. | 329 |
| Queen v. Gardner ... ... ... ... | „ I. Q. B., 150 | 27 |
| ——— v. Rhodes ... ... ... ... | „ I. Q. B., 77 | 28 |

| | | M. L. J. Page. |
|---|---|---|
| —— Sandars v. ... ... ... ... | 1899, I. Q. B,. 490 | 216 |
| Rees v. Thomas ... ... ... ... | „ I. Q. B., 1015, C. A. | 290 |
| Rey v. Ellis ... ... ... ... | „ I. Q. B., 230 | 119 |
| Rhoades, *In re*, Exparte Rhoades ... ... | „ I. Q. B., 905 | 288, 383 |
| Seaton v. Heath, Seaton v. Burnand ... ... | „ I. Q. B., 782, C. A. | 254 |
| Shipway v. Broadwood ... ... ... | „ I. Q. B., 369, C. A. | 180 |
| Smith v. Lancashire and Yorkshire Railway ... | „ I. Q. B., 141, C. A. | 27 |
| Strickland v. Williams ... ... ... | „ I. Q. B., 382 | 180 |
| Thompson v. The London County Council ... | „ I. Q. B., 840, C. A. | 287 |
| Tiedman v. Ledemann Freres, *In re* ... ... | „ II. Q. B., | 328 |
| Union Credit Bank v. Mersey Docks and Harbours Board ... ... ... ... ... | „ II. Q. B., 205 | 381 |
| Williamson v. Morris ... ... ... | „ I. Q. B., 7 | 26 |
| Williams v. Birmingham Battery and Metah Company ... ... ... ... | „ II. Q. B., 338, C. A. | 383 |
| Wyatt v. Palmer ... ... ... ... | „ II. Q. B., 106 | 330 |


## JOTTINGS AND CUTTINGS.


Advice to Law Graduates by Sir Francis Maclean ... ... ... 80
Agency ... ... ... ... ... ... ... ... 30
Air—Property in ... ... ... ... ... ... 389
Alienation of husband's affections, action for ... ... ... 343
Animals Fere Naturæ—Property in ... ... ... ... 85
Arbitrators' fees ... ... ... ... ... ... 185
Arson ... ... ... ... ... ... ... ... 127
Attorney-at-Law ... ... ... ... ... ... 271
Bar—overcrowding of the ... ... ... ... ... 78
Carriers ... ... ... ... ... ... ... 126
Conjugal Rights—Restitution of ... ... ... ... ... 399
Consideration ... ... ... ... ... ... ... 302
Contempt of Court ... ... ... ... ... ... 299
Contracts ... ... ... ... ... ... ... 126, 302
————, breach of, for adoption ... ... ... ... 341
————, assigning future earnings to 10 years ... ... ... 83
Counsel—too many, in a case ... ... ... ... ... 223
Court Room Ortatory ... ... ... ... ... ... 434
Courts in England—Condition of ... ... ... ... ... 299
Criminal Law ... ... ... ... ... ... ... 127
Criminal Sessions of the Madras High Court ... ... ... 294

| | M. L. J. Page. |
|---|---|
| Cross-examination acquittals ... ... ... ... ... | 81 |
| Custody of children ... ... ... ... ... ... | 272 |
| Damages ... ... ... ... ... ... ... | 341, 269 |
| Death Sentence—an example ... ... ... ... ... | 267 |
| Donatio Mortis Causa ... ... ... ... ... ... | 86 |
| Echoes of the Four Courts ... ... ... ... ... | 34, 186 |
| Epigrams ... ... ... ... ... ... ... | 35 |
| Ethics of Advocacy ... ... ... ... ... ... | 300, 339 |
| Forbearance ... ... ... ... ... ... ... | 302 |
| Forensic qualities—Tadfourd on ... ... ... ... ... | 399 |
| Glass Eye Case... ... ... ... ... ... ... | 184 |
| Hawkins, J.—Jokes of ... ... ... ... ... ... | 84 |
| High Court Judges—Indian—Sixty years' rule ... ... ... | 295 |
| Immorality on the Judicial Bench ... ... ... ... | 41 |
| Incomes at the Bar in England ... ... ... ... ... | 383 |
| Indian Judges ... ... ... ... ... ... ... | 262 |
| Injunction against visiting a woman ... ... ... ... | 303 |
| Inns of Court and Law Examinations ... ... ... ... | 223 |
| Insurance Policies ... ... ... ... ... ... | 301 |
| ——— Health of Insured ... ... ... ... ... | 264 |
| Intersection of 2 Streets—Point of intersection in what street ... | 46 |
| Intervention of a third party ... ... ... ... ... | 39 |
| Joseph—His honor Mr. ... ... ... ... ... ... | 337, 338 |
| Judicial opinion—two Types of ... ... ... ... ... | 304 |
| Judgments—Tardy delivery of ... ... ... ... ... | 301 |
| Judges—English,—Some well-known ... ... ... ... | 394 |
| Jury—Judges' remarks about ... ... ... ... ... | 224 |
| Jury's View:—Is it part of a trial? ... ... ... ... | 38 |
| Lady Barristers—Admission of ... ... ... ... ... | 82 |
| Lawyer,—good—Ideal of the ... ... ... ... ... | 393 |
| ———'s duty—to argue for client whom he thinks wrong ... ... | 396 |
| Lawyers—Generosity of ... ... ... ... ... ... | 286 |
| Legal Education—Lord Chief Justice Russell on ... ... ... | 397 |
| Legal Laughs ... ... ... ... ... ... | 83, 185, 346 |
| Legislature—Trusting the ... ... ... ... ... | 391 |
| Liability for False Statements ... ... ... ... ... | 40 |
| Life Insurance—Assignment ... ... ... ... ... | 82 |
| Lord Lytton's Description of Daniel O'Connell addressing an out-door Meeting ... ... ... ... ... ... ... | 266 |
| Lord Herschell—Tribute to the Memory of ... ... ... | 79 |
| Lord Watson ... ... ... ... ... ... ... | 340 |
| Malicious Prosecution of Civil Suit ... ... ... ... | 87 |
| Marriage by one having sexual disease ... ... ... ... | 388 |
| Mistake of Law... ... ... ... ... ... ... | 87 |
| Money paid for illegal purposes ... ... ... ... ... | 128 |

| | M. L. J. Page. |
|---|---|
| Nebraska Legislation ... ... ... ... ... ... | 185 |
| Negligence ... ... ... ... ... ... ... | 39, 40 |
| New Year Honors—The ... ... ... ... ... | 433 |
| Parent and Child ... ... ... ... ... ... | 304 |
| Passing of Executrix—The ... ... ... ... ... | 3 |
| Patients—Are they to be kept alive at all hazards ?... ... ... | 388 |
| Percolating Waters ... ... ... ... ... ... | 302 |
| Pleaders as Directors ... ... ... ... ... ... | 261 |
| Pleadership Examination ... ... ... ... ... | 88 |
| Posthumous Judgments ... ... ... ... ... ... | 301 |
| Privacy—Right to ... ... ... ... ... ... | 36 |
| Privacy—Right of ... ... ... ... ... ... | 441 |
| Privilege ... ... ... ... ... ... ... | 41 |
| Procedure, Novel ... ... ... ... ... ... | 262 |
| Promiscuous kissing of wife—Husband not bound to receive wife ... | 399 |
| Property ... ... ... ... ... ... ... | 302 |
| Property in Air... ... ... ... ... ... ... | 389 |
| Property in Animals Fere Nature... ... ... ... ... | 85 |
| ——— Mustache ... ... ... ... ... ... | 392 |
| Punjab Chief Courts Act, 1899 ... ... ... ... ... | 399 |
| Q. Cs. —New list of ... ... ... ... ... ... | 224 |
| Quasi Contracts... ... ... ... ... ... ... | 87, 128 |
| Review of Appeal ... ... ... ... ... ... | 32 |
| Sir Walter Scott—on Lawyers ... ... ... ... ... | 84 |
| Slander... ... ... ... ... ... ... ... | 41 |
| Stamp Law—The new ... ... ... ... ... ... | 32 |
| Supreme Court of United States—Working of ... ... ... | 297 |
| Teaching of Law at Harward ... ... ... ... ... | 443 |
| Telegrams—Mistake in—Damages ... ... ... ... | 124 |
| Thomas Raliegh—The new Law Member ... ... ... ... | 30 |
| Torts ... ... ... ... ... ... ... | 39, 40, 41, 87 |
| Touting by Attorney-at-Law ... ... ... ... ... | 271 |
| Train—Duty to stop, for fallen passenger ... ... ... ... | 392 |
| Trials ... ... ... ... ... ... ... ... | 269 |
| ——— by Judge and Jury ... ... ... ... ... | 265 |
| ——— ——— Propriety of urging the Jury to agree ... | 269 |
| Trusts—Fraud by Agent—Statute of Frauds ... ... ... | 128 |
| Unborn children—Rights of ... ... ... ... ... | 37 |
| Vakils carrying on business ... ... ... ... ... | 120 |
| Vakils—Enrolment of ... ... ... ... ... ... | 122 |
| Void conditions... ... ... ... ... ... ... | 302 |
| Waiver of condition ... ... ... ... ... ... | 301 |
| Wall Tax Road, Murder case ... ... ... ... ... | 31 |
| Ways of necessity—What are they ? ... ... ... ... | 123 |
| William M. Evarts ... ... ... ... ... ... | 46 |

| | M. L. J. Page. |
|---|---|
| Wit ... ... ... ... ... ... ... ... | 304 |
| Wit and Wisdom of Chief Justice Bleckley ... ... ... | 31 |
| Women as Lawyers ... ... ... ... ... ... | 263 |

**Notes of American Cases—** ... ... ... ... ... 225,306, 403,446

# LIST OF CASES CITED

## IN THIS VOLUME.

### A.

| | | |
|---|---|---|
| Abedoonissa v. Ameeroonissa... ... ... | 4 I. A., 73 | 18 |
| Achel Ram v. Udai Pertab ... ... ... | L. R., 11 I. A., 51 | 325 |
| Ackerman v. Lockhart ... ... ... | L. R., 2 Ch., 1 C. A. '98 | 2 |
| Adaikkalam Chetti v. Marimuthu ... ... | I. L. R., 22 M., 326 | 426 |
| Administrator-General of Bengal v. Prem Lall Mullick ... ... ... ... | L. R., 22 I. A, 107 | 16 |
| Alami v. Komu ... ... ... ... | I. L. R., 12 M., 126 | 143 |
| Aman Singh v. Narain Singh ... ... | I. L. R., 20 A., 98 | 249 |
| Amrita v. Lakhinarayan ... ... ... | 2 B. L. R., 28 | 154 |
| Ananda Bibee v. Nownit Lal... ... ... | I. L. R., 9 C., 327 | 155 |
| Annapurni Nachiar v. Collector of Tinnevelly ... | I. L. R., 18 M., 278 | 278 |

### B.

| | | |
|---|---|---|
| Babu Lal v. Nanku Ram ... ... ... | I. L. R., 22 C., 339 | 151, 154 |
| Backhouse v. Charlton ... ... ... | ... 8 Ch., 444 | 415 |
| Bai Devkore v. Amritram Jamiatram ... ... | I. L. R., 10 B., 372 | 95 |
| Bai Kesserbai v. Narranji Walji ... ... | I. L. R., 4 B., 353 | 5 |
| Balakrishna Bapuji v. Lakshman Dinkar .. | I. L. R., 14 B., 605 | 277 |
| Balamma v. Pullayya ... ... ... | I. L. R., 18 M., 168 | 277 |
| Baldeo Singh v. Kishan Lal ... .. ... | I. L. R., 9 A., 411 | 21 |
| Balusami Pandithar v. Narayana Row.. ... | I. L. R., 20 M., 342 | 156 |
| Bandhu Naik v. Lakhi Kuar ... ... ... | I. L. R., 7 A., 342 | 72 |
| Beerchander Joobraj v. Neelkissen Thakoor ... | 1. W. R., 177 | 322 |
| Beetham, *in re* ... ... ... ... | 18 Q. B. D., 380 | 414 |
| Bengal Banking Corparation v. Mackertict ... | I. L. R., 10 C, 315 | 413 |
| Bhawani Gulam v. Deoraj Kuari ... ... | I. L. R., 5 A., 548 | 323 |
| Bhawani Prasad v. Kallu ... ... ... | I. L. R., 17 A., 537 | 251 |
| Bhimul Doss v. Choonee Lall... ... ... | I. L. R., 2 C., 379 | 324 |
| Bhishanchurn Roy Chowdhry v. Jogendra Nath Roy ... ... ... ... ... | I. L. R., 26 C., 114 | 169 |
| Bhugirath Patoni v. Lochun Deb ... ... | I. L. R., 8 C., 275 | 286 |
| Bhyah Ram Singh v. Bhyah Ugursing... ... | 13 M., I. A., 373 | 160 |

| | | M. L. J. Page. |
|---|---|---|
| Binda v. Kaunsilia ... ... ... ... | I. L. R., 13 A., 126 | 259 |
| Birch v. Ellames ... ... ... ... | 2 Arush 427 | 413 |
| Birchunder v. Harish Chunder ... ... | I. L. R., 3 C., 383 | 286 |
| Bommarauze Bahadur v. Rangasamy Mudaly ... | 6 M. I. A., 232 | 169 |
| Brindavana v. Radhamani ... ... ... | I. L. R., 12 M., 72 | 355, 356 |

C.

| | | |
|---|---|---|
| Chappan v. Moidin Kutti ... ... ... | I. L. R., 22 M., 68 | 115 |
| Chelikani Tirupati v. Rajah Surneni ... ... | 6 M. H. C., 278 | 154 |
| Chinia Pillai v. Munisami Aiyar ... ... | I. L. R., 22 M., 289 | 249 |
| Chinnammal v. Venkatachala ... ... ... | I. L. R., 15 M., 421 | 154 |
| Chowdhry Chintamun Singh v. Mussamut Nowlukho Konwari ... ... ... ... | L. R., 2 I. A., 263 | 322 |
| Coggan v. Pogose ... ... ... ... | I. L. R., 11 C., 158, | 410, 412 |

D.

| | | |
|---|---|---|
| Debi Parshad v. Thakur Dial... ... ... | I. L. R., 1 A., 105 | 324 |
| Dickson v. Muckleston ... ... ... | L. R., & Ch., 155 | 412 |
| Doe v. Bevis ... ... ... ... | 7 C. B., 456 | 215 |
| Dwarkanath Nitter v. S. M. Sarat Kumari Dasi | 7 B. L. R., 55 | 413 |

E.

| | | |
|---|---|---|
| Edathil Itti v. Kopashan Nair ... ... | 1 M. H. C. R., 222 | 140, 205, 206 |

F.

| | | |
|---|---|---|
| Fateh Chand v. Muhammad Baksh ... ... | I. L. R., 16 A., 259 | 375 |

G.

| | | |
|---|---|---|
| Ganpat Pandurang v. Adargi Dadabhai ... | I. L. R., 3 B., 312 | 414 |
| Girendro Coomar Dutt v. Kurund Kumari Dasi | I. L. R., 25 C., 611 | 413 |
| Giridhari Lall Roy v. Bengal Government ... | 12 M. I. A., 448 | 154 |
| Gogobai v. Srimat Shashaji Malaji Row Raoje Bhosle... ... ... ... ... | I. L. R., 17 B., 120 | 245 |
| Goonomonee Dossia v. Parbutty Dossia ... | 10 W. R., 326 | 169 |
| Gunesh Chunder Roy v. Nil Komul Roy ... | 22 W. R., 264 | 154 |

H.

| | | |
|---|---|---|
| Haggard v. Pelicier Freres ... ... ... | [1892] A. C., 61 | 238 |
| Hieru v. Mill ... ... ... ... ... | 13 Ves 104, | 413, 414 |
| Higham v. Ridgeway ... ... ... ... | 10 East 109, | 216 |
| Himalaya a Bank v. F. W. Quarry ... ... | I. L. R., 17 A., 252 | 408 |

I.

| | | |
|---|---|---|
| Iravanni Ravi Varman v. Ittappu Ravi Varman.. | I. L. R., 1 M., 153 | 203 |
| Ishan Chunder Sirkar v. Beni Madhub Sirkar ... | I. L. R., 24 C., 62 | 115 |

| | | M. L. J. Page. |
|---|---|---|
| **J.** | | |
| Jagjivan Amirchand *v.* Hasan Abraham ... | I. L. R., 7 B., 179 | 21 |
| Jiorudas Kerhawji *v.* Framji Nanabhai ... | 7 B. H. C. R., 45 | 413 |
| Jogendro Bhupati *v.* Nityanand Man Sing ... | I. L. R., 18 C., 151 | 320 |
| **K.** | | |
| Kailasa Padiachi *v.* Ponnukonnu Achi ... | I. L. R., 18 M., 486 | 168 |
| Kaipreta Ramen *v.* Makkaiyil Mutoren ... | 1 M. H. C., 359 | 140 |
| Kedarnath Dutt *v.* Sham Lal Khettry ... | 11 B. L. R., 405 | 413 |
| Kensington, Exparte ... ... ... | 2 V., & B. 82 | 414 |
| Kasheeshuree Debia *v.* Greesh Chunder Lahoree. | Sup. Vol. W. R., 1864 p. 71 | 244 |
| Katama Natchiar *v.* The Rajah of Shivagunga ... | 9 M. I. A., 549 | 326 |
| Kedar Nath Kant *v.* Kali Churn Ram ... ... | I. L. R., 25 C., 703 | 374 |
| Koiloth P. M. Koran *v.* P. M. C. Nair .. ... | 2 Mad. Jur., 117 | 206 |
| Kondi Menon *v.* Srangiureagatta Ahammad ... | 1 M. H.C., 248 | 140 |
| Konerrav *v.* Gurrav... ... ... ... | I. L. R., 5 B., 589 | 285 |
| Koran Nair *v.* Chandu Nair... ... ... | 3 M. H. C. R., 295 | 140, 204 |
| Krishnan *v.* Appu ... ... ... ... | 6 Travancore L. R., 49 | 140 |
| Krishnayya *v.* Pichamma ... .. ... | I. L. R., 11 M., 187 | 148, 154 |
| Kunhamod Hajee *v.* Kuttiath Hajee ... ... | I. L. R., 3 M., 170 | 143 |
| **L.** | | |
| Lakshmanammal *v.* Tiruvengada Mudaliar ... | I. L. R., 5 M., 241 | 148, 154 |
| Lallubhai *v.* Mankuvarbai ... ... ... | I. L. R., 2 B., 388 | 154 |
| Lawrence *v.* Norreys ... ... ... | 15 A. C., 211 | 281, 284 |
| Luchmeedhur Pattuck *v.* Rughoobur Singh ... | 24 W. R., 285 | 169 |
| Lutchanna *v.* Saravayya ... ... ... | I. L. R., 18 M., 164 | 286 |
| **M.** | | |
| Madho Das *v.* Ram Kishen ... ... ... | I. L. R., 14 A., 238 | 412 |
| Madras Deposit and Benefit Co. *v.* Oonnamalai Ammal... ... ... ... ... | I. L. R., 18 M., 29 | 411 |
| Maharani Hiranath Koer *v.* Baboo Ram Narayan Singh ... ... ... ... ... | 9 B. L. R., 324 | 323 |
| Maharani Shri Ranmal Singji *v.* Vadelal Vakhatchand ... ... ... ... ... | I. L. R., 20 B., 61 | 168 |
| Mahomed Hossein *v.* Kokil Singh ... ... | I. L. R., 7 C., 91 | 21 |
| ——— Yusuf *v.* Abdur Rahim Behari ... | I. L. R., 26 C., 839 | 375 |
| Manckji Framji *v.* Rustomji Naserwanji Mistry | I. L. R., 14 B., 269, | 412, 415 |
| Manik Chand *v.* Jagat Settani ... ... | I. L. R., 17 C., 518 | 155 |
| Mannickam *v.* Tattayya ... ... ... | I. L. R., 21 M., 388 | 18 |
| Mayandi Chetti *v.* Mrs. Oliver ... ... | 8 M. L. J. R., 196 | 170 |
| Mari *v.* Chinnamma ... ... ... ... | I. L. R., 8 M., 107 | 159, 277 |

| | | M. L. J. Page. |
|---|---|---|
| McDougall *v.* Knight ... ... ... | 25 Q. B. D., p. 1 | 282 |
| Meenakshi Nayudu *v.* Immudi Kanaka Ramaya Goundan ... ... ... ... | I. L. R., 12 M., 241 | 164 |
| Metropolitan Bank *v.* Pooley... ... ... | 10 A. C., 210 | 280 |
| Modhu Sudan Shaha *v.* Brae ... ... ... | I. L. R., 16 C., 300 | 286 |
| Mohan Das *v.* Krishna Bai ... ... ... | I. L. R., 5 B., 597 | 154, 160 |
| Moideen Saiba *v.* Nagappen ... ... ... | I. L. R., 7 B., 96 | 249 |
| Mon Mohun Buksee *v.* Gunga Soondery Dabee ... | I. L. R., 9 C., 181 | 121 |
| Muchiram Barik *v.* Ishan Chunder Chuckerbutti. | I. L. R., 21 C., 569 | 375 |
| Muhammad Bakar *v.* Bahal Singh ... ... | I. L. R., 13 A., 277 | 251 |
| Munda Chetty *v.* Thimmaju Hensu ... ... | 1 M. H. C., 380 | 144 |
| Mussamut Doorga Bibee *v.* Janaki Prasad ... | 18 W. R., 331 | 154 |
| Muthusami *v.* Muthukumaraswami ... ... | I. L. R., 16 M., 23, 23 I. A., 83 | (154, 155, 160) |
| Muttuvaduganadha *v.* Dora Singha ... ... | I. L. R., 3 M., 328 | 275 |
| Myna Bai *v.* Uttaram ... ... ... | 2 M., H. C. R., 201 | 278 |
| **N.** | | |
| Nagamuthu *v.* Saviriuuthu ... ... ... | I. L. R., 15 M., 226 | 166 |
| Nallanna *v.* Ponnal ... ... ... ... | I. L. R., 14 M., 149 | 154 |
| Naraini Kuar *v.* Chandi Din ... ... ... | I. L. R., 9 A., 467 | 154 |
| Narayani *v.* Sirkar ... ... ... ... | 1 Travancore, L. R., 92 | 143 |
| Naro *v.* Ramchandra ... ... ... | I. L. R., 13 A., 326 | 824 |
| Natesan Chetti *v.* Govinda ... ... ... | I. L. R., 7 M., 352 | 205 |
| ———— *v.* Soundraraja Ayyangar ... | I. L. R., 21 M., 141 | 427 |
| Nathen Valad Pandu *v.* Budhu Valad Bhuka ... | I. L. R., 18 B., 537 | 71 |
| Naraganti Achammagaru *v.* Venkatachalapati Nayanivaru ... ... ... ... | I. L. R., 4 M., 267 | 323 |
| Neelkisto Deb Burmono *v.* Beerchunder Thakoor | 12 M., I. A., 523 | 321 |
| Nilmoney Singh *v.* Heera Lall Dass ... ... | I. L. R., 7 C., 23 | 286 |
| **O.** | | |
| Oo Noung *v.* Moung Htoon Co. ... ... | I. L. R., 13 C., 322 | 431 |
| **P.** | | |
| Panbiya Telaver *v.* Puli Telaver ... ... | 1 M., H. C. R., 484 | 362 |
| Paradine *v.* Jane ... ... ... ... | Aleyn 26 | 214 |
| Paramananda Doss *v.* Mahabir Dossji ... ... | I. L. R., 20 M., 378 | 115 |
| Paramasiva Goundan *v.* Kandappa Goundan ... | 8 M. L. J., Rep. 201 | 20 |
| Parot Bapa Lal Sevakram *v.* Mehta Harilal Surajram ... ... ... | I. L. R., 19 B., 631 | 153 |
| Peary Mohun Chowdhry *v.* Romesh Chunder Nundy... ... ... ... ... | I. L. R., 15 C., 371 | 20 |
| Pedda Ramappa *v.* Bangari Seshamma ... | I. L. R., 2 M., 286 | 276, 277 |
| Pettachi Chettiar *v* Sangili Vira Pandia Chinnatambiar ... ... ... ... | I. L. R., 10 M., 241 | 164 |
| Phumb *v.* Fluitt ... ... ... ... | 2 Anstr 432 | 413 |
| Pryce *v.* Barry ... ... ... ... | L. A. 16 Eg. 15 Bn. | 415 |

| | | M. L. J. Page. |
|---|---|---|
| **Q.** | | |
| Queen Empress *v.* Sri Churn Chingo ... ... | I. L. R., 22 C., 1017 | 16 |
| ——— *v.* Viran ... ... ... | I. L. R,, 9 M., 224 | 248 |
| **R.** | | |
| Rajah Leelanund Singh *v.* Mussamut Lakhputtee Thakoorain ... ... ... ... | 22 W. R., 31 | 115 |
| Rajah of Venkatagiri *v.* Seik Bade Sahib ... | 8 M., D. J. R., 219 | 20 |
| Rajkishore Lahoory *v.* Gobind Chunder ... | I. L. R., 1 C., 27 | 319, 322 |
| Ramabhadra *v.* Jaganmatha ... .. | I. L. R. 14 M. 78 | 426 |
| Ramachandra Rayaguru *v.* Modhu Padhi ... | 2 L. A. 21 M. 326 | 415 |
| Rama Kurup *v.* Sri Devi ... ... ... | I. L. R., 16 M., 290 | 252 |
| Ramappa Udayan *v.* Arumugath Udayan ... | I. L. R., 17 M., 182 | 154 |
| Ramalakshmi *v.* Sivanantha Perumal ... ... | 14 M., I. A., 570 | 276, 360 |
| Ramasami Ayyan *v.* Virasami Aiyar ... ... | I. L. R., 21 M., 222 | 251 |
| Ramasami *v.* Narasamma ... ... ... | I. L. R., 8 M., 133 | 277 |
| Ramasami Kamaya Naik *v.* Sundara Lingasami Kamaya Naik ... ... ... ... | I. L. R., 17 M., 422 | 318, 353 |
| Rameswar Koer *v.* Mahomed Mehdi Hossein Khan | I. L. R., 26 C., 39 | 18 |
| Ramia *v.* Ranganayakamma ... ... ... | (Unreported) | 323 |
| Regina *v.* Aunger ... ... ... ... | 12 Cox Cr. Cases 407 | 246 |
| ——— *v.* Labouchere .. ... ... | 12 Q. B., 320 | 246 |
| ——— *v.* The World ... ... ... | 13 Cox Cr. Cases 305 | 246 |
| Remington *v.* Scoles... ... ... .. | [1897] 2 Ch. 1 | 283 |
| Richardson, *re* ... ... ... ... | 30 Ch. D. 396 | 414 |
| Russick Lall Pal *v.* Romanath Sen ... ... | I. L. R., 21 C., 792 | 375 |
| **S.** | | |
| Sartaj Kuari *v.* Deoraj Kuari ... ... | I. L. R., 16 A., 272 | 163, 321 |
| Sethurama *v.* Ponnammal ... ... ... | I. L. R., 12 M., 155 | 149, 154 |
| Shungara *v.* Krishnan ... ... ... | I. L. R. 15 M. 267 | 426 |
| Sheobarat Kuari *v.* Bhagwati Prasad ... ... | I. L. R., 17 A., 523 | 154 |
| Sheo Soondary *v.* Pirthee Singh ... ... | L. R., 4 I. A., 147 | 322 |
| Shillito *v.* Hobson ... ... ... ... | 30 Ch. D. 396 | 414 |
| Shivram *v.* Narayan... ... ... ... | I. L. R., 5 B., 27 | 285 |
| Smith *v.* Harrison ... ... ... ... | 1 F. & F., 565 | 246 |
| Sobhanadri Appa Rau *v.* Chellamanna ... | I. L. R., 17 M., 225 | 19 |
| ——— *v.* Sriramulu ... ... | I. L. R., 17 M., 221 | 168 |
| Sri Neth Roy *v.* Godadhur Das ... ... | I. L. R., 24 C., 348 | 416 |
| Sri Raja Rau Lakhmi Kantaiyamma *v.* Sri Raja Inuganti Rajagopal Rau ... ... ... | I. L. R., 21 M., 242 | 160 |
| Stephenson *v.* Garnett ... ... ... | [1898] 1 Q. B., 677 | 282 |
| Strinivasa Ayyangar *v.* Strinivasa Swami ... | I. L. R., 16 M., 31 | 164 |
| Subba Heggady *v.* Thongu ... ... ... | 4 M. H., C. R., 196 | 140 |

| | | M. L. J. Page. |
|---|---|---|
| Subbaraya v. Kylasa ... ... ... | I. L. R., 15 M., 300 | 154 |
| Subba Singh v Sarafroy Kunwar ... ... | I. L. R., 19 A., 223 | 158 |
| Sundarammal v. Rangasami Mudaliar ... ... | I. L. R., 18 M., 193 | 154, 156 |
| Swinhoe and Chunder v. Hera Lal Sirkar ... | 2 C. W. N. | 8 |

T.

| | | |
|---|---|---|
| Taylor v. Russel ... ... ... ... | [1891] I. Ch. 8 | 418 |
| Teencowree Chatterjee v. Dinonath Banerjee ... | 3 W. R., 49 | 242, 244 |
| Thayammal v. Annamalai Mudali ... ... | I. L. R., 12 M., 35 | 277 |
| Theyyavelan v. Kochan ... ... ... | I. L. R., 21 M., 7 | 251 |
| Timmayya Mada v. Lakshmana Bhatta ... | I. L. R., 7 M., 215 | 169 |
| Todd v. P. P. Kunhamod Haju ... ... | I. L. R., 3 M., 174 | 141, 205, 207 |

U.

| | | |
|---|---|---|
| Udayana v. Senthivelu ... ... ... | I. L. R., 19 M., 411 | 16 |
| Umaid Bahadur v. Udoi Chand ... ... | I. L. R., 6 C., 119 | 149 153 |

V.

| | | |
|---|---|---|
| Varathayyangar v. Krishnasami ... ... | I. L. R., 10 M., 102 | 285 |
| Varankode Narayan Nambudri v. Varankode Narayan Nambudri .. ... ... | I. L. R., 2 M., 329 | 142, 203, 205, 206, 207 |
| Varden Seth Sam v. Luckpathy Royjee Lallah ... | 9 M. I. A. | 408, 409 |
| Vasudevan v. The Secretary of State for India... | I. L. R., 11 M., 181 | 136 |
| ——— v. Sankaran ... ... ... | I. L. R., 20 M., 133 | 207 |
| Virchand Lalchand v. Kumaji ... ... | I. L. R. 18 B. 48 | 427 |

W.

| | | |
|---|---|---|
| Watson v. Dhonendra ... ... ... | I. L. R., 3 C., 6 | 285 |
| Whitbread v. Jordan ... ... ... | 1 Y. and C. 303 | 413 |
| Willis v. Earl of Beauchamp ... ... ... | 11 P. D., 59 | 281 |

Y.

| | | |
|---|---|---|
| York Union Banking Co. v. Artlay ... ... | 11 Ch. D. 205 | 415 |

## REVIEWS.

Commentaries on the Civil Procedure Code, by Hukm Chand, M.A. ... 435
Common Form Draftsman. By Wild and Cooper ... ... ... 192
Evidence—Guide to best principles of ... ... ... ... 273
Hindu Law. By Audinarayana Patro ... ... ... ... 347

| | M. L. J. Page. |
|---|---|
| Index of Cases reported in I. L. R., Allahabad Series. By Dharam Das Suri ... ... ... | 88 |
| ——— Madras Series ... ... ... | 273 |
| Indian Stamp Act—No. II. of 1899. By D. E. Cranenburgh ... | 89 |
| ——— By C. V. Visvanatha Sastri, B.A., B.L. ... ... | 273 |
| ——— Law. By Desai Narotam ... .. ... ... | 194 |
| Indian Court Fees Act, by Desai Narotam... ... ... ... | 347 |
| Kelly's Draftsman, 3rd Edition ... ... ... ... ... | 47 |
| Lawyer and Magistrate ... ... ... ... ... ... | 47 |
| Partnership—The Law of—By A. Underhill, M.A., LL.D. ... ... | 192 |
| Presumptions and Inferences. By G. C. Whitworth ... ... | 89 |
| Quarterly Advance Sheets of the General Digest, American and English | 193 |
| Yearly Abridgment of Reports. By Murray for 1898 ... ... | 193 |
| Yearly Practice of the Supreme Court for 1899 ... ... ... | 89 |

HAREN... N MITRA ... HIGH COURT ... UNIVERSITY ... LIBRARY

The Madras Law Journal.

PART I.] JANUARY 1899. [VOL. IX.

# LIEN OF SOLICITORS AND ARBITRATORS AND THEIR PROTECTION FROM PRODUCING DOCUMENTS ON GROUND OF LIEN.

The ordinary rule of law is that documents must be proved by primary evidence except in certain specified cases mentioned in S. 65, Evidence Act (I of 1872). Primary evidence means the document itself produced for the inspection of the Court—S. 62 *ibid.* Both these provisions forcibly illustrate the maxim that the best evidence that the case admits of must always be produced. Where, therefore, a plaintiff sues on a document which is not in his possession, but in the power of another—whether a party to the suit or a stranger and the opposite party does not by his pleadings admit the existence and contents of the document so as to make its production perfectly immaterial, it becomes essential that the plaintiff should take steps to have it produced before the Court. If the document be in the possession of the defendant, the Court is empowered by S. 130, Civil Procedure Code, to order its production *suo motu,* and the following section authorizes the plaintiff to give notice to the defendant through the Court to produce it. If the defendant wilfully fails to comply with an order of Court to produce the document, he is liable to have his defence struck out under S. 136, Civil Procedure Code. But there are cases where the production of the document is so essential to the success of the plaintiff's case that he is unable to obtain a decree, unless it be produced. This will be illustrated *infra.* Now taking the other contingency—supposing the document is not in the possession of either party, but of a stranger, S. 159, Civil Procedure Code, empowers the plaintiff to apply to the Court for a summons against the person having possession of the document. If the person so summoned produces the document either in person or by agent—well and good—there arises no complication at all. The Court is

seized of the document and can proceed to dispose of the case according to its merits. But supposing such person refuses to produce the document. The question on what grounds he may refuse is one of very great consequence and no little difficulty. The only two excuses that a witness may make and known to the law are (1) privilege and (2) lien. Under the cloak of privilege, he may excuse himself on the ground (*a*) that the document wanted is his own title-deed or in virtue of which he holds any property as pledgee or mortgagee, or (*b*) that its production might tend to criminate him, or (*c*) that it is part of an official record relating to affairs of state, or (*d*) that it constitutes a communication made to him in official confidence and that public interests would suffer by disclosure, or (*e*) that it came to him as a professional communication—see Sections 121 to 132, Evidence Act. These rules of privilege and prohibition rest on grounds of public policy. But under this head, a solicitor or attorney or advocate cannot excuse himself where the production of the document is wanted by his client. In this last case he may only plead his *lien*. The question is—is it competent to him to so plead? In some cases cited at page 803 of Amir Ali's Evidence Act it was ruled that a witness cannot withhold production of a document called for as evidence, on the ground of any *lien* he may have upon it. In some other cases cited on the same page this doctrine is qualified by stating that if the party requiring the production be himself the person against whom the claim of lien is made, then he may rightly refuse to produce it, and the Court will not compel him to do so. Mr. Amir Ali's own inclination of opinion as is apparent from his note seems to be in favour of the *unqualified* doctrine. The latest authority in England on the point seems to be the case of *In re Hawkes, Ackerman* v. *Lockhart*, L.R., 2 Ch. 1—C. A., 1898; the head-note runs as follows:—" A solicitor having a lien on documents in his possession belonging to his client, party to an action, may not embarrass proceedings taken in the action by a third party by refusing to produce the documents if wanted by that third party for the purpose of his proceedings, even though the documents may have come into the solicitor's possession before the commencement of the action." At the time of the death of a testator, his solicitor, C., had in his possession certain documents belonging to the deceased, and on which he, C., had the ordinary solicitor's lien. Subsequently, th-

executors of the deceased employed C. to institute an action for the administration of the estate, and the usual administration judgment was pronounced. The action after judgment not being prosecuted with due diligence, conduct of the proceedings was, by order, given to a creditor, the estate being insolvent. The executors, however, remained parties, and C. continued to act for them:—*Held,* by the Court of Appeal (affirming *Kekewich,* J.) that, notwithstanding his lien, C. was bound to produce to the creditor the documents in his possession, to enable the creditor to take steps for getting in a mortgage-debt due to the estate.

In this case the principles and extent of a solicitor's lien were discussed at considerable length by the Master of the Rolls and Lord Justices *Rigby* and *Vaughan Williams.* In the case the documents were, however, required by a third party. The latest direct authority in England seems to be the case of *Fowler* v. *Fowler* reported in Volume 50, Law Journal Reports at page 686, Chancery. The facts were these:—Emma Fowler sued her husband Samuel Fowler, his two sons by a former marriage and the two trustees of her marriage settlement, (mainly) to obtain a declaration that certain furniture, linen and other miscellaneous articles were comprised in her marriage settlement. The settlement was executed by all parties in the presence of Mr. F. W. Oliver, Solicitor. Mr. Oliver was served with *a subpœna duces tecum* to attend as a witness on behalf of the plaintiff and to produce the marriage settlement. He objected to produce it as he had not been paid his costs of preparing it. Counsel for plaintiff contended that the witness could not set up his lien against her while Mr. Oliver claimed that he was not bound to produce until his costs were paid. Mr. Justice *Kay* held that the solicitor was bound to produce the settlement.

Of the Indian Cases on the point we have been able to trace only two. The first is the case of *Swinhoe and Chundar* v. *Herā Lal Sirkar* reported in the 2nd volume of the Calcutta Weekly Notes at p. 727. The facts were these:—A firm of solicitors were summoned to produce certain documents before a Subordinate Judge. They objected to do so claiming a lien upon them for costs due to them from the party at whose instance the documents were called. Their objection having been overruled, they moved the High Court under S. 15 of its Charter. *Held,* that the High Court is not compelled to use the

power of superintendence created by the Charter, unless, in the interests of justice, it finds it necessary to do so, and that in the case before them there was no danger of any such failure of justice, specially having regard to the fact that the loss of this particular remedy, assuming the attorney to be entitled to it, did not involve the loss of his costs, as he still had all the other remedies for the recovery of his claim, which he has in common with all the members of the community. This case was argued by the Advocate-General and Mr. Pugh before a Bench consisting of *Sir Comer Petheram,* C. J., and *Morris* and *Okineally,* J. J. It is to be regretted that the Judges did not decide the point that was raised before them, but cut the Gordian knot by refusing to interfere.

The other case is that of *in the matter of Mr. Cyril Kirkpatrick* reported as No. 22, Punjab Record, 1897, and decided by *Roe,* C. J., and *Chatterji,* J., of the Punjab Chief Court. The facts were as follows :—A., a father, had certain disputes with his son, B. Both appointed C. and D. as arbitrators to settle all matters in difference between them. An award having been published by C. and D., one of the parties applied to the District Judge to have the award filed under S. 525, Civil Procedure Code. The District Judge called upon C., in whose possession the award was, to file it in Court. This the latter refused to do on the ground that in taking up the arbitration he did not intend to act gratuitously, that he had not received his fee as arbitrator which the referring parties refused to pay, that he had a lien on the award for such fee, and that if he produced the award in Court he would be left without a remedy for its recovery. The District Judge considered these objections untenable. C. applied to the Chief Court on the revision side under S. 622, Civil Procedure Code.

For the plaintiff it was contended that the application for revision did not lie; that the Chief Court should not interfere as the applicant had other and more suitable remedies, and that the petitioner had no lien on the award. *Held* (i) that the Chief Court had jurisdiction to entertain the application for revision; (ii) that in the absence of any express promise by the parties to a reference to remunerate an arbitrator, the latter has no right of action in respect of such remuneration, his sole remedy being to refuse to deliver his award until his charges are paid; and (iii) that on general principles and in the absence of any direct provision to the

contrary, an arbitrator has a lien on his award for the payment of his reasonable charges. It was also held that the sections of the Indian Contract Act relating to liens are not exhaustive, and do not negative the existence of liens not therein specified. The Chief Judge held that an arbitrator may properly be regarded as an ordinary seller and entitled to a lien under S. 95 of the Contract Act.

It will be observed that this case decided the following points:—(*a*) That the High Court could properly interfere on revision in such a case; (*b*) that an arbitrator has a lien on his award until delivered; and (*c*) that a Court could not compel him to produce a document over which he had such lien. On the first point this ruling is in conflict with the Calcutta case cited *supra*. Here it might be said that the exercise of the powers of revision is a matter of discretion; but it is very questionable whether it is proper to exercise such power at the instance of a stranger—a third party. The language of S. 622 would appear to show that the power should be exercised only at the instance of the parties to the suit, to whom by law a right of appeal is in the particular instance denied.

"As to the competency of an arbitrator to sue for his fees, though the cases are not quite agreed on the subject, the better opinion is that the appointment of an arbitrator is not of such a nature as to raise an implied promise to pay him a reasonable compensation for his services"—*Russel*, p. 493. "Unless there is an express promise to pay, he may not sue; for his remuneration like that of a physician or barrister is left to the option of his employers. Again the arbitrator has a lien for his reasonable costs on the award and the submission. As the retention of the award is the only security on which practically he can rely for the satisfaction of his claim, the practice commonly prevails not to deliver the award up to the party demanding it, until he has paid the arbitrator's charges"—*Russel*, p. 494. The Judges of the Punjab Chief Court relied on these extracts from *Russel* in support of their view that an arbitrator had a lien on the award. Be that as it may, the important question was, whether an arbitrator entitled to this lien could still withhold the award when called upon by a Court of Justice to produce it. The Chief Court decided this point in favour of the arbitrator on the authority of *Bai Kesserbai* v. *Narranji Walji*, I. L. R., 4 B., 353. This latter case was decided by a single Judge. The facts were as follows:—P. was solicitor for plaintiff. When the case was about to appear in the list for hearing. P. wrote to the plaintiff, requesting an advance to

enable him to deliver briefs to counsel. P. received no reply from the plaintiff, who appeared by other solicitors in the suit. P. was subsequently served with a *subpœna* to produce, at the hearing, certain documents relating to the plaintiff's case which had remained in his possession, and upon which he claimed a lien in respect of costs due to him by the plaintiff. *Held*, by Mr. Justice *West*, that P. could not be compelled to produce. This decision was based on certain English decisions which were cited before the learned Judge—not those which we have cited *supra*, which were not then available. It is presumed that the decision would have been otherwise had these decisions existed and been brought to his notice. It seems hard and unreasonable that an arbitrator, without any express promise of being remunerated, should wantonly and wrongfully withhold his award except on payment of an extortionate fee and then the Courts should be powerless in the matter. Whatever his lien, the English Courts have decided that the holder of the lien can be compelled to produce the subject of lien under a *subpœna duces tecum*, and this seems to be the more reasonable and logical view. In the Bombay case no great hardship was caused to the client, because what the solicitor withheld was some translations of documents made by the Court Translator, and, as the Judge remarked, it was open to the client to procure other translations, but the matter becomes very serious when an arbitrator undertaking an arbitration without express promise or expectation of payment suddenly takes it into his head to demand an extortionate fee. In that case the client has two remedies:

(*a*) to sue to have his fee fixed separate and the award delivered; or

(*b*) to apply to the Court to issue a summons to the arbitrator to produce the award; and if he fails to do so, to proceed against him by attachment of his property—S. 168, Civil Procedure Code.

The former is expensive and dilatory and the persons interested would naturally fight shy of it; the latter is more speedy and effective, and we see no cogent reasons why the courts should embarass the course of justice by refusing their help in the matter, considering that it is both more expedient and inexpensive. The result is that neither a solicitor nor an arbitrator is entitled to refuse or withhold a document on ground of lien.

MADAN GOPAL.

## TRANSLATED FROM THE MADANA PARIJATA.

*The share of the grandson in the grandfather's property.*

On this subject, Yajnavalkya says: "The allotment of shares among sons of different fathers is according to the fathers."[1] Sons of different fathers], the meaning is sons begotten by several brothers on their several wives. Among these, the allotment of shares in the property of the grandfather is according to their respective fathers. The purport is this: if there are three brothers, and one of them has one son, another two, and the third three, then these six (grandsons) do not divide their grandfather's property into six shares and take each a share; but the grandfather's property should be divided (first) into three shares among the three brothers, and the only son of one brother shall (then) take the one share of his father, the two sons of another brother the share of their father; and similarly in the other case also. If after the begetting of sons, some of the brothers die and some others are alive, then the division between the brothers and brothers' sons shall be on the lines laid down already, *i.e.*, the brothers shall take their own shares and the brothers' sons shall take their fathers' shares.

The same author states a distinction in the case of a partition taking place with the father of the grandfather's property: "In land acquired by the grandfather, in corrody or in chattels, the ownership of both father and son is equal."[2] Land] rice-field, etc. *Nibandah*] an assignment or corrody; so many leaves receivable from a plantation of betel-pepper, or so many nuts from an orchard of nuts; this is called corrody, because it is by this computation that quantities of leaves, etc., are assigned by those conversant with that trade. Chattels] gold, silver, etc., obtained by acceptance of gift, conquest, trade, agriculture, etc. In the property of the grandfather consisting of all these, the ownership of both father and son is equal. Therefore, the meaning is that the restrictions such as "'while the father is alive partition should take place only with his consent,' 'the father shall take two shares' and 'the allotment of shares shall be according to the fathers', etc., do not apply. The ownership of the grandson begotten by a Sudra upon a female slave is the same; but there is a distinction with regard to his share. The

1. Yajnavalkya, II, 120. 2. *Ibid*, II, 121.

special mode of division in his case is the same as that laid down for the partition of a subsequently born son.

Nor could it be objected that there is an inconsistency as the text 'among sons of different fathers', etc., lays down the right of the grandson in the grandfather's wealth to be through the father and not by himself and as the text 'in land acquired by the paternal grandfather, etc.', lays down the equal right of the father and the son in the grandfather's wealth. The text 'among sons of different fathers, etc.', applies to the partition of the grandfather's wealth among grandsons whose fathers are dead.

This is indicated by the expression 'the allotment of shares is according to the fathers'; it is understood that the grandsons have a claim to the grandfather's property only through their fathers. This, however, does not hold good where the father is alive, as he has ownership in the grandfather's property by his mere birth; but if the father is dead, the grandsons have a right to the property, as the father's right to it has ceased by his death; thus the mode of division of the grandfather's property is restricted by the text: "the allotment of shares among sons of different fathers is according to their fathers." "Land acquired by the grandfather"; this applies in respect of the grandson's right to the grandfather's property when both the father and the son are alive; and this is indicated by the portion of the text 'of the father and the son in that property shall be equal'; for as the deceased could have no ownership, the portion of the text, 'the right of the father and the son in that property shall be equal' would have no application where either of them is dead. Where there are three brothers, and one of them has one son, another two and the third three, and where all the fathers and sons are alive, the allotment shall be made as formerly laid down. But if, however, among the issue of one brother both sons and grandsons exist, among the issue of another only sons are alive and among the issue of the third only grandsons, then the sons of the living father take the grandfather's property as laid down by the rule 'land acquired by the grandfather'. Where the sons have predeceased and the grandsons alone are alive, then the grandsons only shall not take their shares. This is according to the principle of the text, 'among sons of different fathers, etc.,' and not of the text 'in land acquired by the grandfather', for their fathers are dead; this rule

of division applies only where the grandfather is dead. Where the grandfather is alive, partition takes place at the will of the grandfather or his son but not at the will of the grandson; because when speaking of the time of partition it has already been said that partition takes place at the will of the father sometimes and at other times at the will of the son.

---

*The determination of the share of the mother.*

On this subject, Yajnavalkya says: "If he make the shares equal, then his wives should be made equal sharers, if no *stridhana* had been given them by the husband or the father-in-law."[1] The word '*sama*' (equal) denotes that these should be neither less nor greater; or the word 'equal' may refer to the allotment of shares as pointed out in the text 'they take four, three, two and one shares respectively'; it is said to be equal, being legal, *i.e.*, in conformity with the codes of law. Such being the case, if the father makes of his own free will his sons equal sharers, then his wives also should be made equal sharers. If the sons begotten on Brahmini and other wives be equal sharers, then their respective mothers also shall get equal shares; if, however, the *murdhávasikta* and other sons get three, two and one shares respectively, then their mothers also shall take equal shares with their sons.

To whom no *stridhana* had been given] ornaments, etc. If stridhana had been given, then the mode of allotment should be understood to be that laid down in the chapter on *Adhivedhakani* (property given at the time of supersession). The manner laid down there is this, *viz.*, if it had been given, a half is ordained. The word 'half' (in 'half' is ordained) means 'a portion' not an exact moiety.

By how much money the *stridhana* falls short of the son's share so much money should be given and the wife's share made equal to the son's. But if it be objected that on this view *stridhana* will become partible, only the mode being different, and that this would conflict with the text laying down the impartibility of *stridhana*, it is unsound. Where there is a special rule, the general rule of impartibility of *stridhana* yields, but where there is none, it stands good. Here the texts 'to whom no *stridhana* has been given',

1. Yajnavalkya, II, 115.

NOT TO BE REMOVED
DEPARTMENT OF LAW

and 'if it has been given, a half should be given' must necessarily be read together and are exceptions to the general rule. But when the father makes an unequal distribution according to the text 'he may give the eldest the best share', then the wives do not get the best shares, etc.; but only take equal shares in the common property left after the allotment of the best shares, etc. They also get the deductions allowed for them.

Likewise, Apastamba: "*Paribhánda*, the household ornaments belong to the wife, as also household utensils."[1] *Paribhánda*] mill-stone, mortar, pestle, winnowing basket, etc.

Even at the partition instituted by the sons after the death of the father, the mother gets on equal share. So Yogisvara: "Of sons dividing after their father, the mother also takes an equal share."[2] After the father] after the father's death. Here also the two texts: 'to whom no *stridhana* had been given by the husband or the father-in-law' and 'if given, a half is ordained', should be applied, because of parity of reasoning and of want of anything to the contrary; this is the view of Vijnanesvara, Dháresvara and others. Otherwise, the word 'half' in 'if given, a half is ordained' will denote an equal partition; therefore, it is implied that in case there is stridhana, a half of the share of a son should be given, *i.e.*, if the son has ten nishkas, then the mother should be given an allotment of five nishkas. The ornaments of the wives of brothers are certainly indivisible, likewise even where the females themselves are parties to the partition, the ornaments previously given severally to each of them are also indivisible; and this will become clear in the chapter on 'impartible wealth'. When, however, the father and the son divide and take the wealth acquired by the grandfather, then the wife of the grandfather gets an equal share with her son, in the manner already laid down, in the text: "The mother too gets an equal share," and because it is the property of the grandfather. If the wives of the paternal grandfather are issueless, then they receive their ornaments given out of affection and no share. Thus at a partition of the effects of the grandfather, the mother does not receive a share, but only her ornaments, etc.

"If he makes the shares equal, his wives shall be made equal sharers," likewise "let them divide after the death of the father;

---

1. Apastamba, II, 6, 14, 9.

2. Yajnavalkya, II, 123.

Acc. No.

and the mother also shall take an equal share;" for these texts apply to the case in which the father has predominant interest; that wealth which the father obtained at a partition or acquired by acceptance of gift is wealth in which the father had a predominant interest. It has been already said that the father's wealth goes to the son.

On the question who is entitled to the mother's wealth, Yajnavalkya says: "The wealth of the mother remaining after discharging her debts, the daughters shall take; in their default, their issue."[1] The daughters shall divide and take the mother's effects remaining after discharging the debts contracted by her. The distinction in this case is this: Where there are both married and unmarried daughters, the unmarried daughters alone shall take. In the absence of the unmarried daughters, the poor among the married daughters shall take.

Likewise Gautama: "The *stridhana* belongs to the daughters unmarried and unendowed." *Apratta*] unmarried.[2] Unendowed] poor. In default of daughters, as in the absence of sons, the issue of the daughters (succeed). The meaning of this, viz., that the daughter takes the property first and then their issue, is stated in the latter portion.

LP2259

*Next, persons competent to take the Stridhana of a woman dying without issue.*

On this point, Yajnavalkya: "If a woman dies leaving no issue, her relations shall take that; the *stridhana* of a woman married in the four forms of marriage, Bráhma, etc., goes to her husband; if in the other forms of marriage, it goes to her parents. But if she has issue, it goes to her daughters."[3] The *stridhana* of a woman dying without any issue, *i.e.*, having no daughter, daughter's son, son or son's son, etc., her relatives as husband, etc., take. If the woman is married in (any of) the Bráhma, Daiva, Arsha or Prájápatya forms dies, her husband gets her wealth; in default of him, those persons who are nearest related take. The inference is that in their absence, those who are nearest in the father's line take. The wealth of a woman married in (any of) the remaining Asura,

1. Yajnavalkya, II, 117.
2. Gautama, XXVIII, 24.
3. Yajnavalkya, I, 145.

Gandharva, Rakshasa and Paisacha forms, the parents take; first, the mother; and in her absence the father; in default of him, the nearest relations in the family of the husband; in default of them, the nearest relations in the family of the husband. If she has issue, her wealth goes to her daughters and her daughters' sons, etc., in whatever form of marriage she might have been married. If the term 'daughter' here were taken to denote the daughter of the mother whose wealth is divided, it would simply be repeating what has been already laid down in the text, 'the daughters shall take the wealth of the mother remaining after discharging her debts." Even among granddaughters, if there exist both married and unmarried, the unmarried alone take; if there are both endowed and unendowed, the unendowed alone; if there exist granddaughters unequal in number born of different mothers, the allotment of shares is by the mothers. That is stated by Gautama: "There is a special mode of division in the case of the lines of the father, mother and sister."[1]

If there exist both daughters and granddaughters, something but not a share should be given to the granddaughters out of affection. So Manu: "To the daughters even of these (daughters), something according to merit should be given out of the grandmother's property, as a token of affection."[2] Daughters of these] daughters' daughters in the absence of granddaughters, daughters' sons shall take, as is laid down by Narada: "The daughters shall take the wealth of the mother; in the absence of daughters, their issue."[3] The meaning is that the daughters take the wealth of the mother; in the absence of these daughters, her progeny, *i.e.*, daughters' sons. Another reading is 'the issue' (nominative singular).

So the daughter's sons alone take; not the issue (daughter) of the daughter's daughter, as she is more remote than the daughter's son. In default of these daughters' sons also, the sons, grandsons, denoted by the word 'issue' in "the daughters take what remains of the wealth of the mother after discharging her debts, and in their default their issue," take the wealth in their order. With this same idea, Manu says: "After the death of the mother, the uterine

1. Not found. 2. Manu, IX, 193. 3. Narada, XIII, 2.

brothers shall divide her wealth equally, as also unmarried uterine sisters."[1] The purport of this text is: "those sisters who are born of the same mother take; in their absence, their descendants up to daughter's son take; in their absence, the (uterine) brothers. The brothers of the deceased woman and not the sons of co-wives take; in their default, the grandsons." The use of the word 'uterine' in 'the uterine brothers shall divide equally' is to exclude the sons of co-wives. In the absence of her own sons, the sons of co-wives succeed; if, however, the daughter of a co-wife belongs to a higher caste, than the son of another co-wife, then the daughter of higher caste alone takes; in her default, the daughters' sons of the same description alone.

So also Manu: "The wealth of a woman given her by her father, the Brahmini daughter takes; or else it goes to her issue."[2] It is said that the maiden takes the wealth of the woman; the word 'woman' is used absolutely, and so also the word 'maiden.' As these two words 'woman' and 'maiden' are not co-relatively used, these may be understood to refer to the stepmother and the stepdaughter also. The word 'Brahmini' is used illustratively of a maiden of higher caste. Thus the stridhana of a Sudra woman, the Brahmini, or Kshatriya or Vaisya daughter takes; so the Brahmini or the Kshatriya daughter takes the stridhana of a Vaisya woman; and likewise the Brahmini daughter takes the wealth of the Kshatriya woman. Here as it is stated that a daughter of a co-wife of high caste takes the property of a woman of a lower caste, it is understood that the daughter of a co-wife of a lower caste has no right to the wealth (of a woman of a lower caste) if there exists sons of a co-wife of a higher caste.

In default of sons and grandsons, the brother takes; in his default, his sons; thus in this order the brothers, etc., are heirs. The stridhana, excepting sulka alone, should be divided; for the brothers alone take the sulka. So Gautama: "The sister's sulka belongs to the uterine sisters, and after them to the mother."[3] The meaning is that even, if the heirs from daughters to son's son are alive, the uterine sisters shall alone take the sister's sulka. Something about a betrothed damsel is stated in the connection of stridhana.

1. Manu, IX, 192. 2. Ibid, IX, 198.
3. Gautama, XXVIII, 25.

Yajnavalkya: "He who having betrothed a damsel (to a certain person) afterwards keeps her from him, should be punished, and made to pay the expenses with interest; if she dies, let him pay what was given (by the bridegroom for the damsel) after calculating the expenditure of both parties."[1] A father who having promised his daughter (to a person) takes her back from him, even though he is free from defect, should be punished by the king, according to his caste, wealth and general character, etc. He should be made to return to the bridegroom with interest all the money spent by the bridegroom, his father, etc., for the betrothal. If the betrothed damsel dies before marriage, the bridegroom shall take back the sulka previously given (to the damsel), *e.g.*, rings, etc.; after doing what? after calculating the expenditure incurred both by himself and the giver of the bride; (the meaning is) let the bridegroom take only what remains of the property given to the damsel, *e.g.*, rings, etc., after deducting from it the expenses incurred by both the parties on account of the betrothal.

Baudhayana states a distinction in the taking of head ornaments, etc., given out of affection to a damsel before the time of betrothal, by her mother's father, father, etc., intending her own ownership: "Let the uterine brother always take the wealth of a deceased damsel; in his default, the wealth goes to the mother, and in her default to the father."[2] By an easy transition from the subject on hand, something is said even in the case of the living wife.

Yogisvara: "The husband need not repay to the wife stridhana taken by him during famine, for the performance of religious duties, during disease or while in duress."[3] Performance of religious duties], *i.e.*, those which should indispensably be performed. If under these cirumstances, the husband having no other resource takes the *stridhana*, he need not return that wealth to her; the meaning is that he cannot be compelled to repay; if under other circumstances, it should certainly be repaid, as the husband only is permitted (to take) in the above-mentioned circumstances and as punishment is laid down in the case of others, according to the text: "Those relatives who take perforce their wealth while they are alive, a righteous king should visit with the punishment for theft."[4]

1. Yajnavalkya, II, 146.
2. Not found.
3. Yajnavalkya, II. 147.
4. II. Cole. Dig. 598 CCCCLXXX.

Yajnavalkya thus lays down the nature of *stridhana*: "What is given by the father, mother, husband and brother, what is obtained before the nuptial fire, and what is given at the time of supersession, etc., are declared to be stridhana; as also what is given by relatives, Sulka and Anvadheyaka." Obtained before the nuptial fire] given by maternal uncles, etc., at the time of marriage before the fire.

Adhivedhanika is also described thus: "To a superseded wife, let him (the husband) give an equal sum, for the act of supersession, provided stridhana had been given her; but if it had been given, one half shall be allotted."[1] A superseded wife is one over whom a second marriage is contracted. The meaning is that adhivedhanika is money given to her for being superseded; he shall give an equal sum]. the meaning is that a sum equal to that spent in ornaments, etc., for the second wife should be given to the first (superseded) wife. Here he lays down a distinction: 'to whom no stridhana had been given.' The meaning of this has been explained at length in the connection of the determination of the mother's share. By the particle 'etc.,' in 'adhivedhanika, etc.,' are meant what was gained by the spinning of cotton, sale, partition, acceptance of gift, finds, etc.

Katyayana: "Whatever is given to women at the time of their marriage before the nuptial fire is denominated by the sages 'stridhana given before the nuptial fire.' Again what a woman gets when being led from the house of her father (to that of her husband) is called '*stridhana* given at the time of the nuptial procession.' Whatever is given out of affection either by the mother-in-law or father-in-law, as a token of affection, and that which is given in return for her humble prostrations is called '*stridhana* given out of affection.' What is received by a woman before or after marriage in the house of her husband or of her father, from her brother or her parents, is called saudayika. What is received by a woman after marriage in the family of her husband or in the family of her father is called gift subsequent."[2]

S. SITARAMA SASTRI.

1. Yajnavalkya, II. 148.
2. II. Cole. Dig. 585 CCCCLXIV & V. & 586 CCCCLXVI; 587 CCCCLXVIII.

## NOTES OF INDIAN CASES.

**Ramachandra Rayaguru v. Modhu Padhi,** I. L. R., 21 M., 326. The question in this case was as to the applicability of Art. 132 or 147 to suits for sale of mortgage instruments. The Court by a majority of three to two held that Art. 132 applied. Chief Justice *Collins* was one of the members constituting the majority, and though his present view is at variance with the decision in *Udayana* v. *Senthivelu*, I.L.R., 19 M., 411, in which he appears to have taken part, he vouchsafes no explanation for the change. We have carefully perused the elaborate arguments of *Shephard* and *Subrahmania Aiyar*, JJ., by means of which they arrive at the conclusion that Art. 147 is only applicable to suits for foreclosure or sale in the alternative. Mr. Justice *Subrahmania Aiyar's* judgment deals with the proceedings of the Legislative Council, the language of the several Bills that were before the Council and refers to a multitude of circumstances relating to the history of the article in support of the interpretation. We believe he must have been aware of the decision of the Privy Council in *Administrator-General of Bengal* v. *Prem Lall Mullick*, L. R., 22 I. A., 107, deprecating all reference to proceedings of the Legislature or the state of things antecedent to the enactment of the law in interpreting the provision of a Statute. See *Queen-Empress* v. *Sri Churn Chungo*, I. L. R., 22 C. 1017, and *Norendra Nath* v. *Kamalbasini*, 23 I. A., 18. Dealing with the language of the article itself, the argument that he advances in favor of his interpretation is that otherwise there would be no article applicable to suits for foreclosure or sale in the alternative or Art. 120 alone could apply. We confess we are unable to see the force of this contention. Because there is one article for the recovery of immoveable property and another for the recovery of moveable property and none for the recovery of moveable or immoveable property it cannot be said that a suit of this latter description is unprovided for, or must wholly fall under Art. 120. The plain rule appears to us to be to hold that a suit for foreclosure or sale in the alternative would fall within the article even though you have to read it distributively. Mr. Justice *Shephard* again thinks that as English mortgages give rise to suits for foreclosure or sale and they were dealt with by a special clause in connection with the Presidency towns before the present Act, Art. 147 of the present Act must, therefore, be regarded as referring to such suits wherever they may be instituted. This reasoning also does not commend itself to us. The natural interpretation of the article is to regard it as dealing with suits for foreclosure and with suits for sale. To set aside this simple grammatical interpretation which is also logical, there

must be very strong reasons indeed. We are unable to find any. It may be said and, we would quite agree, that a long period like 60 years is unnecessary for suits for sale. But that is a matter for the Legislature. We may also be of opinion that the abnormally long periods provided for some other cases are equally unnecessary. There is no special argument to be brought forward in the one case any more than in the other from the undesirability of this lengthy period.

**Kombi Achen *v.* Kochunni,** I. L. R., 21 M. 352. S. 561 entitles the respondent to raise objections to the decree of the court below upon the hearing of the appeal. The right to the objections being heard would seem to depend upon the question whether the appeal itself is heard. If the appeal is thrown out on the ground that no appeal lies or that it has been filed out of time or the appeal abates or is withdrawn, it is clear that the appeal is not heard and, therefore, the objections of the respondent cannot be. There may be a question, however, where the appeal itself is heard though it is ultimately disposed of on the ground that no appeal lay or that it was barred by time. We should imagine that, although the section has been literally complied with, the disposal of the case on one of these grounds involves a refusal to hear the appeal and, therefore, the respondent's right to have his objections heard must fail. There is an observation in *Kamat* v. *Kamat*, I. L. R., 8 B. 368, that even though it may be ultimately held that no appeal lies, if it has been heard, the respondent's right to raise objections subsists. We are unable, however, to accept this decision as correct. It is a little more difficult to determine whether an appeal is heard when it is dismissed on the ground of non-joinder of proper parties to the appeal. We conceive that the plea of non-joinder which affects the hearing of the appeal would generally affect the memorandum of objection too. But even if it does not, can it be said that the appeal is heard when it is dismissed on the ground of want of parties? The objection is one which does not affect the suit itself and the appeal which seeks to upset the decision by the court below upon the issues in the case remains unheard when the objection of non-joinder affects the appeal alone. In a general and loose sense, it may be said that the appeal must be heard before the non-joinder may become clear; and if it is in this sense that the hearing is spoken of in S. 561, the decision in the case under notice may be right.

**Sethuravar v. Shanmugam Pillai,** I. L. R., 21 M. 353. This case involves several difficulties which have not been satisfactorily overcome by the learned Judges. There is no doubt that if an agent has obtained an advantage the principal is entitled to it. If he has recovered money

due to the principal, the principal would be entitled to it. Where he has merely obtained a decree upon the bond, we do not see how that is an advantage which the principal can take. A principal cannot execute a decree which an agent has obtained. He may obtain a declaration that the decree was obtained by a person as his agent; but that will not entitle him to do anything unless the law of procedure enables him to get into the shoes of the agent and execute the decree. But this evidently it does not.

Assuming that a man can obtain a declaration that another has obtained a decree as benamidar, is it so clear that he can execute the decree, unless there is a transfer by operation of law? S. 232 enables the transferee to apply for execution; and Ss. 91 and 95 of the Trusts Act refer to cases of property vesting in one for the benefit of another. The benamidar had the benefit of a contract which has been merged in a decree and the decree is no more a right *in rem* than the bond upon which it is obtained. We cannot speak of a transfer by operation of law from the benamidar to the real owner because a decree had been obtained upon the obligation. In *Abedoonissa* v. *Ameeroonissa*, 4 I. A. 73, the Privy Council said that there was no transfer from the widow who was placed on the record on the death of her husband pending the suit to the persons really entitled, so to enable them to execute the decree as transferees of the widow. It may be that S. 232 ought to be made more elastic. But with the section as it stands it seems difficult to hold that the real owner is the transferee from the benamidar subsequent to the decree. See however *Mannickam* v. *Tattayya*, I. L. R., 21 M., 388.

**Ramayyar v. Ramayyar**, I. L. R., 21 M., 356. Hard cases, it is said, make bad law, and we are inclined to think that this is perhaps one of them. Every execution by a decree-holder who has been paid out of court is undoubtedly fraudulent and if the fraud is a reason for the executing court staying its hand, S. 258 should not be in the Statute book. There was a promise, it is said by the decree-holder, to certify and he executed the decree notwithstanding and purchased the property in court-sale. If the execution is legal notwithstanding the fraud, there is nothing illegal in the sale, the leave to bid and the purchase, and yet the Court has set aside the sale on the ground of fraud in not certifying satisfaction.

**Subbaraya Ravuthaminda Nainar v. Ponnusami Nadar**, I. L. R. 21 M. 364. The question as to the rate of interest which it is competent to the Court to award has now been determined by the Privy Council in *Rameswar Koer* v. *Mahomed Mehdi*, I. L. R., 26 C., 39. As to the

competency of the Court to fix a rate under S. 209 beyond the date fixed for realization, the Allahabad and Calcutta Courts have differed, the former holding the section of the Procedure Code inapplicable to mortgage decrees. We think the Calcutta view has been rightly preferred.

**Maidan v. Janikiramayya,** I. L. R., 21 M., 371. In an appeal by a defendant against a decree for mesne profits the amount of which was left to be determined in execution, the High Court held that no stamp was payable by the appellant upon the mesne profits. There is no doubt about the correctness of the decision as the mesne profits decreed were subsequent to the institution of the suit. We should think the same result ought to follow even if the amount of the mesne profits had been fixed because there is no cause of action in respect of subsequent profits or interest which are entirely within the discretion of the Court and do not form part of the subject-matter of the suit or the appeal. As we have repeatedly remarked, the Court Fees Act which is a clumsy enactment very much out of date is the parent of much injustice. Under cover of its somewhat unintelligible provisions court-fees are oftentimes demanded at random by ignorant officers from whom there is no appeal. The evil is a crying one, and it is time for the Legislature to look into it.

**Mahabala Bhatta v. Kunanna Bhatta,** I. L. R., 21 M., 371. The decision in this case appears to us to be very important in the interests of justice. The rules as to joinder of parties and causes of action have worked grievous injustice in many a case. But we must say that this is almost the first time when a judge has boldly stepped out of the accustomed groove and declared that a suit shall not be dismissed for non-joinder of other tenants-in-common. It is a prudent and convenient course to make all tenants-in-common parties plaintiffs or defendants. The failure to do so shall not lead to the dismissal of the suit. This salutary rule cannot apply to suits on contracts, because you cannot divide them nor to cases of joint tenants, but where the action is not upon a contract and the parties claim as tenants-in-common with others not parties, there is nothing to prevent the operation of this rule. This case appears almost an innovation in the processual law of this country, but there is nothing in the Code against it, and we, therefore, welcome it.

**Venkatagiri Rajah v. Ramasami,** I. L. R., 21 M., 413. The decision in *Appayasami* v. *Subba*, I. L. R., 13 M. 463, has practically been overruled by their Lordships, *Subrahmania Aiyar* and *Davies*, J. J., in this case. In *Sobhandhri Appa Rau* v. *Chellamanna*, I. L. R., 17 M., 225, the earlier case was distinguished. But the principle of the decision itself is

wrong, the rent being due on the dates on which according to the *kist bandi* it is payable, limitation must run from those dates and not from the end of the fasli. The question was more fully discussed by *Subrahmania Aiyar* and *Benson*, J. J., in *Rajah of Venkatagiri* v. *Seik Bade Sahib*, 8 M. L. J., Rep. 219, and the same rule is enunciated in *Paramasiva Goundan* v. *Kandappa Goundan*, 8 M. L. J., Rep. 201.

**Sami Pillai v. Krishnasami Chetty**, I. L. R., 21 M., 417. In execution of a decree for money, a decree for money which the judgment-debtor had obtained against another person was attached and under S. 293, the attached decree was executed. The judgment-debtor of the attaching decree-holder objected to the sale of the properties of his judgment-debtor as irregular and upon a decision against him preferred an appeal. The High Court had to consider the question whether an appeal lay under S. 244. That depended upon the further question whether the attaching decree-holder was the representative of a party in respect of the attached decree which was being executed. *Subrahmania Aiyar* and *Benson*, J. J., answer that the attaching decree-holder was no party and, we take it, also not the representative of a party. Their decision is opposed to *Peary Mohun Chowdhry* v. *Romesh Chunder Nundy*, I. L. R., 15 C., 371, which does not appear to have been quoted. It seems clear to us that the Calcutta decision is right. The attaching decree-holder is an assignee by operation of law and stands in the same position as the assignee of a part of the decree. Attachment may not in law operate as a transfer in interest, but the provisions of S. 273 place the attaching decree-holder in the position of a transferee of part of the decree. Suppose questions arose between the judgment-debtor of the attached decree and the attaching decree-holder in the course of execution proceedings, how are they to be dealt with except under S. 244. The attaching decree-holder cannot be the representative of a party for some purposes and not for others.

**Manicka Gramany v. Ramachandraiyer**, I. L. R., 21 M., 482. The question is whether a tenant who has been ejected under S. 10 of the Rent Recovery Act, can maintain a suit for posession questioning the legality of the order. S. 99 of the Act appears to us to make it clear that there is a right of appeal from the order of ejectment. S. 76 denies revision unless a right of action is especially granted. We should imagine that the order of ejectment cannot be questioned by suit. If the order of the Collector was not a judicial order it is possible to suppose that the Act does not take away a right of action which the person aggrieved may have. But there can be really no doubt that the Collector's order is judicial.

**Ratnam Ayyar v. Krishna Doss Vital Doss,** I. L. R., 21 M., 494. A judgment-debtor who is dispossessed of property in execution may apply for possession under the Code. But Art. 165 applies to his application.. See also *Mahomed Hossein* v. *Kokil Singh,* I. L. R., 7 C., 91. But if he happens to be a minor at the date in which his right to apply accrues he is entitled to the benefit of S. 7 of the Limitation Act which expressly applies to applications as well as to suits. See *Baldeo Singh* v. *Kishan Lal,* I. L. R., 9 A., 411; *Mon Mohun Buksee* v. *Gunga Soondery Dabee, Ib.* 9 C., 181; *Jagjivan Amirchand* v. *Hasan Abraham, Ib.*, 7 B., 179.

---

## SUMMARY OF RECENT CASES.

*Civil Procedure Code (Act XIV of* 1882), *Ss.* 244, 311 *and* 588—*Application to set aside sale on the ground of fraud—Second appeal—Limitation Act (XV of* 1877), *Arts.* 166, 178.

**Bhuban Mohun Pal v. Raja Peary Mohun Mukerjee.**

*Held*—that an application to set aside a sale on the ground of fraud comes under S. 244, notwithstanding that the purchase was made by a person who was a third party, and not under S. 311, which relates to setting aside a sale on the ground of irregularity in the conduct of the sale.

*Held further*—that an application to set aside a sale on the ground of fraud of the decree-holder and the auction-purchaser falls within Art. 178 and not Art. 166, which relates only to an application to set aside a sale on the ground of irregularity in publishing or conducting the sale, or on the ground that the decree-holder has purchased without the permission of the Court, and that it is not barred by time :—3 *C. W. N. LXXX.*

---

*Criminal Procedure Code (Act X of* 1882), *Ss.* 145, 147, 182—*Ferry—Tangible immoveable property—Offence—Jurisdiction of Magistrate.*

**Maharaja Harbullabh Narain Sing Bahadur v. Bajrang-Dass.**

A ferry does not come within the description of "tangible immoveable property" as used in S. 145 of the Criminal Procedure Code of 1882. Disputes regarding ferries come within the scope of S. 147.

S. 182 relates only to cases of offences, that is, acts which are punishable by law, and a case under S. 145 is not a case relating to an offence :—3 *C. W. N.* 149.

*Appeals, hearing of, when records have been accidentally destroyed—Practice —New trial, right of.*

## Har Kumar Pal Chowdry v. Sheikh Asiatullah.

Where, in the interval between the original hearing of a case and the appeal, the record, or the greater part of it, was destroyed in an earthquake, and the appellate Court set aside the judgment of the first Court and directed the suit to be tried *de novo*.

*Held*—that the mere fact that the record was accidentally destroyed cannot give the appellant a right of re-trial of the original suit, and that it is open to the Court of Appeal to try the case upon any materials proved to have been used at the hearing of the first Court, and it is for appellant to put those materials before the Court:—3 *C. W. N.* 150.

---

*Mahomedan Law—Wakf—Alienation by trustees without sanction of Judge whether voidable or void—Right of suit—Possession.*

## Shama Churn Roy v. Abdul Kabeer.

A Civil Court of superior jurisdiction in the district is vested, generally speaking, with the powers exercised by the *kazi*. Before an alienation of trust property can be made by the trustee, the sanction of the *kazi*, in other words the Judge, is essential.

Where the trustees of a certain mosque without obtaining the sanction of the Judge sold the lands in dispute which formed a part of the trust property to the plaintiffs in order to raise money to meet the expenses of litigation and the repair of the mosque:

*Held*—that the sale was not merely voidable but void:—3 *C. W. N.* 158.

---

*Act No. XLV of 1860 (Indian Penal Code), Ss. 192 and 193—Fabricating false evidence—False entry made by a Police officer in a special diary.*

## Queen-Empress v. Zakir Husen.

*Held*—that a Police officer who made a false entry in the special diary relating to a case which was being investigated by him could not be convicted therefor of the offence of fabricating false evidence as defined in S. 192 of the Indian Penal Code, inasmuch as the document in which the alleged false entry was made was not one which was admissible in evidence. *Empress* v. *Gauri Shankar* (I. L. R., 6 A., 42) and *Keilasum Putter* (5 Mad, H. C. Rep., 373) referred to:—*A. W. N. for* 99, *p.* 5.

---

*Act No. XLV of 1860 (Indian Penal Code); Ss. 96 et seq.—Right of private defence—Act No. I of 1872 (Indian Evidence Act), S. 105—Presumption—Pleadings.*

**Queen-Empress v. Timmal.**

*Semble*—that an accused person who at his trial has not pleaded the right of private defence, but has raised other pleas inconsistent with such a defence, cannot in appeal set up a case, founded upon the evidence taken at his trial, that he acted in the exercise of the right of private defence. *Queen-Empress* v. *Prag Dat* Weekly Notes, 1898, p. 117) referred to:—*A. W. N. for* 98 *and* 208.

---

*Act No. XIX of 1873 (N. W. P. Land Revenue Act); S. 185—Sale for arrears of revenue—Disposal of surplus proceeds—Distribution amongst creditors of defaulter—Suit by one of such creditors against another—Cause of action.*

**Kunj Behari Lal v. Parsotam Narain.**

An estate which had been mortgaged separately to two different mortgagees was sold for default in payment of Government revenue. By the sale a much larger sum than was sufficient to satisfy the arrears of revenue was realized. The Collector, instead of paying the surplus to the defaulter, mortgagor, paid therewith one of the mortgagees in full and the other in part. The mortgagee who had been paid in part only sued the other mortgagee for the balance due on his (the plaintiff's) mortgage, alleging that it was prior to that of the defendant and ought to have been paid off in full. *Held*, that the suit would not lie. The action of the Collector in contravention of the express provisions of S. 185 of Act No. XIX of 1873 gave the plaintiff no cause of action against the other mortgagee:—*A. W. N. for* 98 *p.* 210.

---

*Act No. VII of 1870 (Court Fees Act), Sch. I, Art. 5—Court-fee—Review of judgment.*

**Imdad Hasan Khan v. Badri Prasad.**

On a reference to the Taxing Officer of the Court it was *held* that the court-fee prescribed as payable on an application for review of an appellate judgment must be computed according to the valuation for purposes of court-fee of the appeal, irrespective of what may be the value of the relief sought by the application for review:—*A. W. N. for* 98 *p.* 212.

---

*Act No. IV of* 1882 (*Transfer of Property Act*), *S.* 85—*Mortgage—Non-joinder of parties—Subsequent mortgagee after suit on prior mortgage filed.*

**Ishaq Ali Khan *v.* Chunni.**

*Held*—that S. 85 of the Transfer of Property Act, 1882, does not require the joinder in a suit on a prior mortgage of a subsequent mortgagee whose mortgage was only executed subsequently to the filing of such suit :—*A. W. N. for* 98 *p.* 214.

---

*Civil Procedure Code, S.* 539—*Suit for a declaration that a certain piece of land is a grave-yard—Jurisdiction.*

**Muhammad Abdullah Khan *v.* Kallua.**

*Held*—that a suit for a declaration that a certain piece of land was a grave-yard dedicated to the use of such persons as had no grave-yards of their own, and asking the Court to appoint a mutawalli and settle a scheme for the management of the grave-yard, was not such a suit as fell within the purview of S. 539 of the Code of Civil Procedure. *Lakshmandas Parashram* v. *Ganpatrav Krishna* (I. L. R., 8 B., 365) and *Strinivasa Ayyangar* v. *Strinivasa Swami* (I. L. R., 16 M., 31) referred to :—*A. W. N. for* 98 *p.* 19.

---

*Practice—Transfer of briefs—Legal practitioner appointed to judicial office.*

**Birju Rai *v.* Muhammad Zahir Alam.**

*Semble*—that a legal practitioner who is appointed to a judicial post cannot transfer briefs held at the time of his appointment by him as such legal practitioner :—*A. W. N. for* 99 *p.* 18.

---

*Civil Procedure Code, S.* 622—*Revision—Discretion of Court in exercising revisional powers—Civil Procedure Code, Ss.* 623 *et seq.—Review of judgment.*

**Abdul Sadiq *v.* Abdul Aziz.**

A Munsif granted a review of judgment on a ground which was no ground in law for granting a review, but his order in review had the effect of making the decree in the suit a right decree instead of a wrong decree. The District Judge allowed an appeal from that order on grounds which, having regard to S. 629 of the Code of Civil Procedure, were not open to him. On an application for revision of the Judge's

appellate order it was *held* that the proper course was to set aside only the District Judge's order and to leave standing the order of the Munsif granting a review of judgment, which order, though wrong in principle, was, it appeared, right in its results:—*A. W. N. for* 99 *p.* 1.

---

*Benami transactions, criterion—Funds out of which purchase-money paid—Possession—Receipt of rents—Rendering account.*

**Pundit Ram Narain *v.* Maulvi Muhammad Hadi.**

In most cases of alleged *benami* transactions, the true criterion is to ascertain from whose funds the purchase-money proceeded, but it is not the only criterion where, as in this case, that fact is consistent with the defendant's case, which is that the plaintiff purchased the village for him and intended it to be a gift in return for his services; a much more important fact in such a case is the actual possession, or the receipt of the rents of the property. Plaintiff had admitted that defendant had been in possession of the collections and had not accounted for them for 9½ years.

*Held*—that, although the *benami* deeds are very common in India, the deed of sale in question did not appear to be of that character:—3 *C. W. N. p.* 113.

---

*Joint-property—Deed by joint-owners of the family property appointing trustees for the management of the property, effect of—Deed by joint-owners embodying an agreement not to partition the property, effect of.*

**Radhanath Mukerjee *v.* Tarrucknath Mukerjee.**

By an instrument, purporting to be a deed-of-trust, all the existing joint-owners of the family property deputed the management of the property to trustees for the purposes of the family solely, giving the trustees certain specific directions with regard to the management of the property and the application of the funds. The beneficial rights of the owners was in no way aliened or altered by the deed. By a clause in the deed the joint-owners bound themselves not to ask for partition of the property.

*Held*—that an arrangement of this kind can only be operative just so long as all the joint-owners consent to its being operative and no longer

That it is not competent for owners of property in this country by any arrangement, made in their own discretion, to alter the ordinary incidents of the property which they possess; a joint property, therefore, cannot be made impartible in perpetuity by any such arrangement, though the

owners may, for sufficient consderation, bind themselves to forego their rights for a specified time and definite purpose by a contract which could be enforced against them personally:— 3 *C. W. N. p.* 126.

---

*Wall, common, right to erect superstructure on—Common wall—Party wall—Superstructure, right to erect, on common wall—Pessession of common wall.*

**Amratlal Damodardas v. Lallubhai Dalpatram.**

A party has no right to erect buildings of his own on a wall which is common to himself and his neighbour without the consent of the latter, and so change its nature and virtually oust him from all possession of it:—*Printed judgments of the B. H. C. for* 1898 *p.* 373.

---

*Civil Procedure Code, Act XIV of* 1882, *S.* 257-*A—Judgment-debtor, agreement between a person other than the, and judgment-creditor for postponement of decree—Judgment-creditor—Decree; agreement for postponement of—Execution—Agreement for postponement of decree.*

**Kesu Shivaram Marwadi v. Genu Babaji Powar.**

The provisions of S. 257-A of the Civil Procedure Code do not include within their scope an agreement between a judgment-creditor and a person other than the judgment-debtor, whereby such person in consideration of the postponement of execution of the decree against the judgment-debtor, undertakes to pay to the judgment-creditor a certain sum of money:—*Printed judgments of the B. H. C. for* 1898 *p.* 374.

---

*Sale without license—Sale by servant.*

**Williamson v. Norris [1899, 1 Q. B., 7].**

The question in this case was whether a servant of the House of Commons who sold their liquor and under their orders was guilty of any offence under S. 83 of the Licensing Act of 1872, which runs as follows:—"No person shall sell or expose for sale by retail any intoxicating liquor *without being duly licensed* to sell the same." It was held that he was not, as the phrase "without being duly licensed" could not be applied to a mere servant without a straining of language. It was also held that if a guilty knowledge were proved on the part of the servant, he might, perhaps, be guilty of abetment; but that since under the special circumstances of the case no such knowledge could be imputed to him, he could not be convicted.

---

*Workmen's Compensations Act of 1897—Injury "arising out of and in the course of employment."*

## Smith *v.* Lancashire and Yorkshire Railway.

[1899, 1 Q. B., 141 C. A.]

Where a ticket-collector in getting off from the foot-board of a train in motion caught his foot and fell and was killed, and an action was brought by his legal personal representative to recover the compensation provided by the Act, it was held by the Court of Appeal that since the deceased did not get on the foot-board for any purpose of his employers but only for his own pleasure, the accident could not be said to have arisen "out of" his employment so as to entitle the representative to any compensation under S. 3 of the Act.

---

*Gratuitous bailment—Suit by bailee for injuries arising from a defect in the article lent.*

## Coughlin *v.* Gillison [1899, 1 Q. B., 145 C. A.]

The Court of Appeal held that in cases of gratuitous bailment, in order to make the bailor liable for any injury arising from a defect in the article lent, it must be shown that there was a concealment of any material fact *known* to him, or that there was such negligence on his part, in not disclosing the facts relating to the article as amounted to the same thing. *Blakeman* v. *Buston and Exeter Railway* (1858), 8 E. & B., 1035, and *McCarthy* v. *Young* (1861), 6 H. & N., 329, approved.

---

*Criminal Law—No witness for the defence—Prisoner giving evidence on his own behalf—Prosecutor's right to sum up and comment on the evidence of the accused.*

## The Queen *v.* Gardner (1899, 1 Q. B., 150].

In this case, it was decided by the Court for the consideration of Crown Cases Reserved that the effect of the provision of S. 2, Criminal Evidence Act, 1898, that the prisoner should be called "immediately after the close of the evidence for the prosecution" was not to put an end to the right of the prosecuting counsel to sum up the evidence in the case, but only to postpone it till evidence had been given for the prisoner; and that in so summing up, the counsel was entitled to comment upon the evidence given by the prisoner.

---

*Assignment of lease by lessee—Sub-lease by assignee by way of mortgage—Suit by lessee against the mortgagee of his assignee for the recovery of rent paid by him to the lessor.*

**Bonner v. Tottenham and Edmonton Permanent Investment Building Company** [1899, 1 Q. B., 161, C. A.]

Where the mortgagee of the lessee's assignee agreed with his mortgagor to pay the rent reserved by the original lease, but failed to do so and owing to his default the lessee was compelled to pay rent to his lessor, in a suit by the lessee to recover from his assignee's mortgagee the rent so paid it was held by the Court of Appeal that there was no privity between the parties either by contract or by estate and that the suit was not maintainable, though as between the mortgagor and the mortgagee, the latter had agreed to pay the rent due to the lessor. The right course for the plaintiff in such a case was, the Court said, to sue his assignee and the assignee would then be entitled under his contract to sue his mortgagee to recover the amount paid. *Moule* v. *Garrett* (1870), L. R., 5 Ex. 132; A. (1872), 7 Ex. 101, distinguished.

---

*Evidence of subsequent fraud—Right of Prisoner to give evidence before Grand Jury—Right of Court to comment on prisoner's failure to give evidence.*

**The Queen v. Rhodes** [1899, 1. Q. B., 77.]

Three questions arose for consideration in this case—1. Whether in a trial on a charge of cheating by false pretence, evidence of similar cases of cheating subsequent to the date of the occurrence which is the subject of the charge was admissible to prove fraudulent intent. 2. Whether under the Criminal Evidence Act of 1898, the prisoner was entitled to give evidence on his own behalf before the Grand Jury. 3. Whether the Court had a right to comment upon the failure of the prisoner to give evidence on his own behalf.

On the first question the Court decided that evidence of subsequent frauds was admissible *if* the various transactions were shown to form part of a single system of fraud pursued by the prisoner. When once the continuity of the various transactions was shown, transactions after the date of the alleged particular crime were as relevant in proof of its general character as transactions before that date. *Reg.* v. *Holt* (1860) Bell C. C. 280; 30 L. T. (M. C.) 11 distinguished; *Reg.* v. *Francis* (1874) L. R. 2, C. C. 128, explained and extended.

On the second point, the Court held that the function of the Grand Jury being merely to say whether a *prima facie* case had been made out

by the prosecution, the evidence of the prisoner which was part of the defence could never arise for their consideration.

On the third point, they held that the Court had undoubtedly the right to comment upon the failure of the prisoner to appear and give evidence for the defence, and that the nature and degree of comment must depend upon the circumstances of each case.

---

*Infringement of statute—Information by the Attorney-General—Injunction.*

## Attorney-General v. London and North-Western Railway

[1899, I. Q. B., 72.]

Where an Act of Parliament provides that the trains are to move at the rate of 4 miles per hour at a level-crossing, and information was filed by the Attorney-General to restrain the defendants from driving at any greater rate, it was held by the Court that the injunction should be granted and that the informant need not show that the act complained of had resulted, or was likely to result, in any injury to the public. The Court distinguished this case from those cases in which the action was to restrain a nuisance and the courts refused to interfere without proof of substantial injury, on the ground that in this case information was filed to enforce the *express* terms of an Act of Parliament.

*Attorney-General* v. *G. W. R. Co.* (1872, L. R. 7, ch. 767).
*Attorney-General* v. *Cockermouth Local Board* (1874, L. R. 4 Eq. 172).
*Attorney-General* v. *Sherewsbury Bridge Company* (1884, R. 1 Ch. D., 752) approved of followed.

---

## JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the receipt of the following publications:—

*The Yearly Practice of the Supreme Court for* 1899 by Muir Mackenzie, Lushington and Fox, in one Volume, published by *Messrs. Butterworth and Co., 7, Fleet Street, London* :—Prices 20 net.

*Kelly's Draftsman*, 3rd Edition, by West and Austin, published by *Messrs. Butterworth and Co., 7, Fleet Street London* :—Prices 12-6.

The Lawyer and Magistrate, Nos. 1 and 2 (*in exchange*).
The Bombay Law Reporter for January (*in exchange*).
The Albany Law Journal for January (*in exchange*).
The Calcutta Weekly Notes for January (*in exchange*).
The Allahabad Weekly Notes for January (*in exchange*).
The Green Bag for January (*in exchange*).

The Canadian Law Times for January (*in exchange*).

The Canada Law Journal for January (*in exchange*).

The Educational Review for January (*in exchange*).

The Indian Journal of Education for January (*in exchange*).

The Harvard Law Review for January (*in exchange*).

***

*The New Law Member.*—We hope Dr. Thomas Raleigh may justify his selection to the important office to which he has been called. The place requires a man of exceptional ability. All that we know of him is that he was a good student at college, and has taken some degrees and prizes. He has not been a practising barrister, and his present position as Registrar to the Privy Council does not promise any special qualifications for the new sphere to which he has been called. It is true, Lord Macaulay without any special qualifications as a lawyer proved one of the ablest law-makers of this country by his masterly draft of the Penal Code. But even when he came to this country, Macaulay had achieved a reputation as a man of genius; and he came as a young man of thirty odd summers. But Dr. Raleigh is close upon 50, and has not made his mark within that time in England. Two jurists of high reputation—Maine and Stephen—have shed lustre upon the office. Hobhouse, Stokes and Ilbert were hard-working men who knew the law, and there are no blunders that we have to record against them. Their successors in the office—Scoble and Miller—proved failures. Chalmers had a name in England as a draftsman, but he has not made any reputation here. The law membership has been steadily passing into weaker hands. The result has been that pieces of legislation which at their inception had a logical consistency and completeness have been subjected to a process of tinkering which has changed the shape of the measures and made them look disjointed. Many a blunder of this description can be pointed out in the amendments that have been made in the Penal Code, the Codes of Procedure, and the Evidence Act. A law member who was master of the particular departments of law with which he was dealing and thoroughly conversant with the scheme of the legistation he was remodelling in the light of added experience would not commit the blunders that these more recent occupants of the office have fallen into. What we now know of the public career of Dr. Raleigh gives us no promise of a successful career in this country. But sometimes we are agreeably disappointed. Little did people know what a great and good Viceroy Lord Mayo would make before he landed on these shores. Let us hope that such a disappointment may be in store for us in the case of our new law member.

***

*Wit and Wisdom of Chief Justice Bleckley as shown in the Georgia Reports.*

"When man and wife cö-ôperate for good they can do much good; and so, when they combine against third persons and cô-operate for evil, they can do much harm. In protecting women, Courts and juries should be careful to protect men, too, for men are not only useful to general society, but to women especially."—*Humphrey* v. *Copeland*, 24tS Ga. 548.

"In that stage of the litigation, even when the merits are clearly against the losing party, he should have such mental satisfaction as he could derive from having finished his speech. He should not be slaughtered with his address warm in his bosom, alive and undelivered. His case being finally and for ever lost, with his argument unheard, he would feel perhaps, and sometimes justly feel, that the outrage of deciding without hearing him was greater, far greater than the calamity of the adverse decision. He might get justice, but with it a wound from the Court more painful than any justice the Court could administer; for it is not impossible that a suppressed speech may occasion more mental torture than a lost case."—*Early* v. *Oliver*, 63d Ga. 18.—*The Green Bag.*

***

*The Wall Tax Road Murder Case.*—This case was tried by a special jury and Mr. Justice *Boddam* was the presiding Judge. As usual there were various counts, murder, culpable homicide, grievous hurt, and so on. The jury returned a verdict of not guilty upon the first two and found the prisoners, seven in number, guilty under the minor heads by a majority of eight to one. The Judge said he entirely agreed with them. That, we suppose, meant that he agreed with the acquittal upon the graver heads of charge, though to many people present during the time of the summing up it looked as if the Judge was strong for a conviction, upon the first two counts also.

After expressing his entire agreement with the jury, the Judge said to the prisoners that they had banded together to commit a brutal outrage and had committed grievous hurt, and that death was the result. We do not know what the Judge meant by this. If grievous hurt is intentionally caused and death is the result, the offence is culpable homicide. But the Judge had agreed with the jury in finding that the prisoners were not guilty of culpable homicide. What followed was even more curious. The prisoners were not old offenders; the sentence of the Court was rigorous imprisonment for ten years each. We do not wish to dwell upon the illegal sentence of 15 years, which the Judge first imposed. Except for the reason that the Judge disagreed with the

jury as regards the acquittal on the graver counts, we cannot account for this extraordinarily severe sentence. But would he be justified in keeping that disagreement to himself while expressing agreement with them and making the punishment heavy for the offences of which they are found guilty. We hear lectures to Subordinate Magistrates frequently on their ideas of punishment being very disproportionate to the crimes, sometimes too lenient, sometimes too severe.

We think the learned Judge might have thought over the matter more calmly before pronouncing sentence.

***

*Review* v. *Appeal*.—There is a curious fallacy which you cannot drive out of Mr. Justice *Davies*, argue it as you will. He thinks or seems to act as if he thought that if the lower court has committed a most glaring mistake, not in arriving at a finding of fact, but it may be in awarding a relief which was not asked for or in arriving at a judgment contrary to the admissions of parties, the error is a thing which can be corrected only by review, but not by appeal. There is nothing in the Code that prevents an appeal in cases where an error may be corrected by review. For the matter of that, anything may be corrected by review if only the Judge is willing to correct or intelligent enough to see the error and candid enough to avow it. Provided a person brings himself within the provisions of the Code as regards an appeal or second appeal, he is entitled to have it heard although there might have been another means of getting that relief. We have known several instances in which the learned Judge dismissed appeals and second appeals where the error of the courts below was clear, on the ground that the matter in error was one for review.

***

*The New Stamp Law*.—The Indian Stamp Bill has passed into law as Act II of 1899 and comes into force on the 1st day of July 1899. When the Bill was first introduced we drew attention in 7 M. L. J. to several defects and suggested several improvements. Some of our minor suggestions have been accepted, but several matters of principle on which we had touched have received no attention. We had drawn attention to the unjust rule in force alike in this country and in England that where a document not duly stamped had been lost, no secondary evidence could be given and appealed to the Legislature to abrogate it with such limitations as it might seem proper to them. We were also of opinion that there was not very much in favor of the rule that promissory notes, bills of exchange and instruments chargeable with a duty of one anna

should not be receivable in evidence even on payment of a penalty. The definitions of the terms *Bill of Exchange* and *Promissory Note* have been very much enlarged, but the rule is still retained, that payment of a penalty cannot render such instruments admissible.

We would draw the attention of the public to some of the changes effected by the new law which comes into force from July 1899. An instrument of partition is now defined so as to include an order of a Civil Court for effecting a partition and an award by an arbitrator directing a partition. There is a small item of careless drafting in the Act. An instrument attested by a witness and not payable to order or bearer whereby a person obliges himself to pay money to another is within the definition of a bond. A promissory note is defined in the Act and is said to mean a promissory note as defined by the Negotiable Instruments Act. But an instrument attested by a witness and not payable to order or bearer is a promissory note under the Negotiable Instruments Act. Thus the same instrument falls under both heads of bond and promissory note. Great confusion must result from the definitions of the two terms overlaping each other. We noted with pleasure the provision in the Bill that a receipt which is unstamped may be received in evidence on payment of a penalty of one rupee. But we are sorry to find this beneficial provision limited to its admissibly only *against* the person who should have given a stamped receipt. An instrument *recording an adoption* is liable to a stamp of Rs. 10. We pointed out that the word *record* was liable to misconstruction, but it has nevertheless been retained. Before the present Act, instruments conferring authority to adopt were alone liable to stamp duty.

***

We take the liberty of extracting the following interesting paragraphs from an article named "*Echoes of the Four Courts*" that appeared in the 2nd number of *The Lawyer and Magistrate.*

There are always more barristers than briefs about the Courts. When the legal tyro has put himself into a wig and gown, he must wait for the solicitors to put something in the brief bag. Meanwhile he stays his stomach with books and newspapers, preserving a decent corpulency; and waits his chance. He has a good time of it while he is waiting. The popular picture of the briefless barrister, conscious of his own neglected genius, eating his heart away in moody impatience, is all a mistake. As a rule, he has a much more modest and accurate estimate of his own powers, and a very wholesome terror of the first brief. So he bides his time good-humouredly, and is lucky enough to have the Four Courts Library and Four Courts to wait in.

* * * * *

Close to the entrance sits a big man with a big voice. I never heard elsewhere a voice of such smoothness and volume. Whether he was chosen specially for this accomplishment I cannot say, or how the competitive examination was conducted. But certainly it is the one essential accomplishment for his post. When any barrister is wanted by a solicitor for instruction, courts, or consultation, this Stentor is appealed to. Forthwith he sends the name of the barrister rattling in sonorous thunder through the utmost recesses of the Library. The sound, pleasantly suggestive of briefs and fees, is instantly obeyed. It is the practical call to the Bar.

* * * * *

In the Courts below half a dozen jury cases were in full swing. A man coming up from the Courts was amazed to see the Nisi Prius leader idling at the Library fire.

"Holloa!" he cried, "how is it that you are not engaged in any of the cases that are on to-day?"

"My dear fellow," was the calm reply, "I am in all of them, and I like to be impartial."

* * * * *

A wise old lawyer of our own time, looking over the shoulder of a pupil who was engaged in writing an opinion on some apparently simple question, ran his pen through the words, "I am *clearly* of opinion," which the novice had written. "My young friend," he said, "Never write that you are *clearly* of opinion on any question of law. When you have my years and experience the question you will always have to determine is, on which side the doubt predominates."

* * * * *

In the law reports, too, are to be found jests as good as the best of much maligned Joe Miller. It is, for example, gravely recorded in one quaint old volume how two high waymen fell out over the division of spoils, and one brought a partnership suit in an Equity Court against the other. The pleadings were all in regular form; the "trading" partnership" fully set out. The "stock-in-trade," consisting of masks, horses, swords, pistols and blunderbusses, was duly and regularly scheduled. Then it was gravely recorded that "the said partners as aforesaid, to wit, the plaintiff and defendant, regularly traded at Hounslow Heath, and at divers other highways, heaths and commons of the realm and elsewhere, in purses, watches, snuff-boxes, jewels and other articles of value, and by means of such trading acquired a large number of said purses, watches, snuff-boxes jewels and other articles of value as aforesaid.

But the said defendant refused, and still neglects and refuses, to account to the plaintiff for his equal share of the profits acquired by said trading, as by the aforesaid partnership expressed and provided."

The parties to this remarkble Equity suit were hanged, and their solicitors clipped of their ears and clapped into prison; so the grim joke ended.

* * * * *

A Law Court may be fairly described as a theatre, with the added interest of reality. Therein are enacted "tragedy, comedy, history-pastoral, pastoral-comical, historical-pastoral, tragical-pastoral, tragical-historical-comical-pastoral," often blended together as in real life in inextricable confusion. Almost invariably we find the newspaper report of a trial—even of a murder trial—punctuated with "laughter." A division of labour is usually observed in the humours of a Court. Jokes are provided for the most part by the Judges, and the laughter by the counsel. But now and again the fun breaks out in unexpected places, and even the witnesses and the parties themselves provide their quota for the general amusement. It may, I think, be fairly assumed that if Law Courts are amusing, Irish Law Courts have their fair share of the fun. It is on that hint I write. I offer no warranty of the truth in whole or part of the stories that follow; let them stand or fall on their own merits. A good story is none the worse of being seven-eighths invention; a dull story none the better of being all true.

***

*The Passing of Executrix*: The legislature of New York, at its last session, passed an act doing away with the term "executrix," and providing that executors of the feminine gender shall henceforth be called and known as "executors." How the strongminded of the tender sex will take this remains to be seen. Will they construe it as a compliment elevating them to the rank of their tyrants as a matter of course, or as a degradation, abolishing a distinction hitherto cherished as a privilege? —*The Green Bag.*

***

The following epigrams were exchanged between James Smith and Sir George Stewart Rose, on the subject of Craven street, Strand, where the former was then residing:—

*James Smith.*

At the top of my street the attorneys abound,
And down at the bottom the barges are found.
Fly, Honesty! fly to some safer retreat,
For there's craft in the river and craft in the street.

*Sir George Rose.*

Why should Honesty fly to some safer retreat,
From attorneys and barges? odd rot'em!
For the lawers are *just* at the top of the street,
And the barges are *just* at the bottom.

***

*The Right to Privacy.*—It has long been public opinion that there must be found some principle of law to protect the privacy of the individual from the paragraphs, caricatures, and advertisements of the public print. A development in the law to meet this opinion would seem to be arrested by a recent decision in the Queen's Bench Division. *Dockrell* v. *Dougall,* 78 Law Times Rep. 840. In this case the plaintiff was a physician, the defendant, the owner of a medicine called Sallyco. In an advertisement of his medicine the defendant published of the plaintiff, with substantial truth, but without authorization: "Dr. Morgan Dockrell, physician to St. John's Hospital, London, is prescribing Sallyco as an habitual drink. Dr. Dockrell says nothing has done his gout so much good." For this the plaintiff brought an action; but the suit was dismissed upon the ground that there was no injury to the plaintiff's property or reputation.

The present actions for defamation fail to give a remedy in two classes of cases where there may often be actual wrongs. When a statement is false but is neither libel *per se* nor a cause of pecuniary loss, and when a publication is true, there are no actions for defamation. The existence of this unredressed residue in the law governing publication has given rise to the question whether the modern law does not recognize something in the nature of a right to privacy to protect personal appearance, sayings, acts, and personal relations from unwished publicity. This hypothesis of a right to privacy has appeared by way of *dictum* in late American reports. *Schuyler* v. *Curtis,* 174 N. Y. 434. The tendency of English authority has also been definitely in the same direction until the refusal of a remedy in the principal case. *Prince Albert* v. *Strange,* 2 De G. & Sm. 652. The general result has been that with various reasons and in varying ways relief has been given in the case of some outrages against privacy; but the existence of a special category of rights to privacy has not been clearly realized, or the limits precisely defined. *Dixon* v. *Holden,* L. R. 7 Eq. 488.

The principle upon which a right against an invasion of privacy depends appears from a simple analysis of rights. Even crudest common law protected the person from more than mere batteries: it considered

assaults and insults trespasses as well. The essential element in the trespass was the invasion of the person against the person's will. As sensations grew more intense, that became an invasion of the person which a ruder age did not so consider. The redress for the invasion of privacy may than well be a modern phase of the protection given to the person since the ancient trespass. If this view be correct, any publication which invades the privacy of a private individual, or such privacy of a public individual as he had not forfeited by his position, is a *prima facie* injury without more damage:—*The Harvard Law Review.*

***

*The Rights of Unborn Children.*—The question whether an unborn child has civil rights,—whether an infant may recover damages for injuries received before birth,—is a rare one in the law. It was squarely raised, and decided against the child, *Dietrich* v. *Northampton,* 138 Mass. 14, and discussed in *Walker* v. *Gt. Northern Ry. Co.*, 28 L. R. (Ireland), 69. It has now been brought up again in *Allaire* v. *St. Luke's Hospital*, Appellate Court, First District of Illinois, 30 Chic. Leg. News, 333. There the plaintiff's mother was received by the defendants, a lying-in hospital, for treatment during child-birth. The defendant's neglect,—which was clearly tortious as to the mother,—was the direct cause of an injury to the plaintiff while still in the womb. It is hard to imagine a case in which the facts would be more favorable to the child and more likely to prejudice a court, but it was held that the child could not recover for his injury.

The position of a child *en ventre sa mere* in the other departments of the law gives little sanction to a proposition for granting them civil rights. They are considered in the law of property, but their rights do not come into existence until birth and then relate back. This fiction of relation does not involve any idea of a child *en ventre sa mere* as a separate entity, and at best is a special equitable provision. The criminal law is harder to understand. It is murder or manslaughter if one injures a child *en ventre sa mere*, and that child be born alive, and later dies of the injury. 3 Inst. 50. *Rex* v. *Senior*, 1 Moo. C. C. 346. It is argued that every murder must of necessity be a tort, and that, therefore, there has been a tort against the child in the womb. The answer to this contention probably is that the criminal law has made an error, though a very natural one, in placing this crime against the child in the category of murder; that the fundamental conception of homicide is the application of some force to a human being, a member of society; that this crime properly belongs in the category with the offence of procuring an abortion. The cases that have called the crime murder or

manslaughter have stated no reasons, and the suspicious principle clearly forms no sound basis for analogy.

And not only would it be without precedent in law to allow the child to recover damages for an injury sustained before birth, but it would create an anomalous right. If the child has a right of action it must arise at the time of the injury, but at that time it is uncertain whether the child will be born alive, so that a right of action is created which is contingent on a subsequent irrelevant fact. Strong reasons of public policy too are against allowing this new right of action,—infinitely difficult questions of fact would come before juries, and the courts would be filled with cases brought in bad faith:—*The Harvard Law Review.*

***

*Is a View by the Jury Part of the Trial?*—A trial for murder is so laborious and protracted an affair that some courts are inclined to search far for reasons by which to avoid setting aside a trial once held for a mere technical error of procedure. The case of *People* v. *Thorn,* 50 N. E. Rep. 947 (N. Y.), is perhaps an example of this inclination. A murder had been committed under particularly atrocious circumstances. In the course of the trial, the jury were sent to take a view of the premises where the crime was committed. The prisoner at his own special request did not accompany them; but when the verdict of guilty was finally rendered, he raised the objection that he had not been present through the whole trial, and was therefore entitled to be tried again. The Court of Appeals overruled this objection (O'Brien and Bartlett, JJ., dissenting). The possibility of the prisoner waiving his rights was passed over, and the decision was rested on the ground that he had, as a matter of fact, been present during the whole proceeding, that the view was not a part of the trial, and "that the knowledge acquired by the jury in inspecting the premises was to enable them to better understand the evidence and not to obtain original testimony." The weight of authorities seems against this position. *People* v. *Palmer,* 43 Hun, 401; *People* v. *Bush,* 68 Cal. 623; and the weight of reason is also opposed. In this particular case the absence of the accused does not seem to have influenced the decision. But under different circumstances it might well prove of great importance to have the opportunity of observing the conduct and actions of the jury when taking the view. Suppose, for instance, between the murder and the trial the premises had accidentally become changed in appearance, the jury noting the discrepancy between the testimony and the facts might draw conclusions of vital moment against the defendant's witnesses. If it be argued that the jury

are forbidden by the court to draw conclusions from what they see, the answer is that it is impossible to enforce obedience. Throughout the whole trial the jury must necessarily be comparing the testimony they hear with what they have seen. It is noteworthy, moreover, that when handwriting, bloodstains, or footprints are shown the jury, it is called the production of real evidence, and no one contends that examination by the jury of these matters is not a part of the trial. A "view" is hard to distinguish from this so-called real evidence. Giving the jury-man a view of the premises is something more than giving him a mere instrument, like an eye-glass or an ear-trumpet. It is furnishing him with a basis for inference which will unavoidably be utilized. Hard though it seems to nullify a whole proceeding for such a small reason, yet it is better so, than to set a precedent of disregarding the rights of persons accused of crime:—*The Harvard Law Review.*

***

*Life Insurance—Assignment—Wagering Policy.*—W. insured her life in favor of her executors, administrators, and assigns. She then assigned the policy, according to a prior agreement, in consideration that the assignee pay the premiums. The assignee had no insurable interest in the life of the insured. *Held,* that a legally entitled beneficiary may assign a life-insurance policy to one having no interest. But that the facts in this case showed the assignment to have been a colorable one, the effect of the prior agreement being to make the assignee substantially the real applicant; the policy was therefore a wagering one, and the assignee could not recover on it. *Clement v. N. Y. Life Ins. Co.*, 46 S. W. Rep. 561 (Tenn., Sup. Ct.).

This decision represents the prevailing view in this country, that the assignee of the beneficiary of a life-insurance policy need have no interest in the life insured. *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24. It also seems a correct interpretation of the facts that such a policy as that in the principle case is a wagering one. An arrangement, the effect of which is to make the apparent applicant a mask for the really interested party, who stands no chance of loss beyond his premiums, nearly makes a policy a gambling transaction. *Olmstead v. Keyes*, 85 N. Y. 593:—*Harvard Law Review.*

***

*Torts—Negligence—Intervention of a Third Party.*—The plaintiff was injured by a trunk being thrown against him during a struggle between public porters over baggage left in an insecure position by a servant of the defendant. *Held,* that the negligence of the defendant's

servant was not the direct and proximate cause of the plaintiff's injury. *Murphy* v. *Great Northern Railway Co.*, [1897] 2 I. R. 301.

The case is on the border line, but is correctly decided if the result could not have reasonably been foreseen by the original wrongdoer,—a point upon which the judges touch but lightly. The general rule is that the intervention of a malicious and intentional act of a third party relieves the original wrongdoer of any liability for the results of his negligence. *Alexander* v. *Town of New Castle*, 115 Ind. 51. The mere negligence of an intervening third party, however, does not necessarily break the causal connection between the injury and the original act, especially if, under the circumstances, the intervening negligent act ought to have been anticipated. *Lane* v. *Atlantic Works*, 111 Mass. 136. The present case seems to have been put on the ground that the acts of the porters were acts of "affirmative misconduct" and not of mere negligence. It is questionable whether the majority of courts in this country would follow this case when the misconduct of the third person ought to have been foreseen :—*The Harvard Law Review.*

***

*Torts—Negligence—Liability for False Statements.*—Defendants, directors of a bank, negligently but not fraudulently made false statements as to the condition of the bank. Plaintiff, relying on these statements, purchased stock, which proved worthless. *Held*, that defendants are liable for the damage caused by their statements. *Houston* v. *Thornton*, 29 S. E. Rep. 827 (N. C.).

The English House of Lords decided, in *Derry* v. *Peek*, 14 App. Cas. 337, that similar facts would not support an action of deceit. That case has generally been regarded as settling in England that no action will lie for negligent mis-statements. *Angus* v. *Clifford*, [1891] 2 Ch. D. 449. There was, however, no allegation of negligence in the declaration, so that the point is really a *dictum*. Massachusetts has followed the English doctrine. *Nash* v. *Minn. Tille and Trust Co.*, 163 Mass. 574. But in many States the question is still open. The decision in the principal case seems sound. Granting that deceit will not lie, it seems that an action for negligence should. One who makes positive statements, intending them to be acted upon, should be bound to use ordinary care to see that they are warranted, at least when the statements are made to secure a result which will operate to the personal advantage of the one making them :—*The Harvard Law Review.*

***

*Torts—Slander—Privilege.—Held,* that to justify the speaking of slanderous words on the ground of privilege it must appear, not only that the defendant believed he was speaking the truth, but that there were reasonable grounds for such belief. *Toothaker* v. *Conant,* 40 Atl. Rep. 331 (Me.).

The question raised has been passed upon in only a few American jurisdictions, and the majority of the decisions are in accord with the principal case. *Carpenter* v. *Bailey,* 53 N. H. 590; *Express Printing Co.* v. *Copeland,* 64 Tex. 354; *Briggs* v. *Garrett,* 111 Pa. St. 404. In England it is held that a defendant may avail himself of the defence of privilege if his motive is not wrongful and he has an honest belief in the truth of his statements. *Clark* v. *Molyneux,* 3 Q. B. D. 237. In accord with the English decisions is *Bays* v. *Hunt,* 60 Iowa, 251. It seems to be the better view, however, that immunity is extended sufficiently if a defendant is allowed to escape liability for defamatory statements only when they are made upon a reasonable belief in their truth. This rule checks the spreading of false reports coming from sources on which many persons would rely, but which reasonable people generally would not credit:—*The Harvard Law Review.*

***

*Immorality On The Judicial Bench.*

By *T. Crisp Poole, Esq., Barrister-at-Law, Brisbane, Queensland, Australia.*—The writer of the following remarks has long felt that the matter of which they treat is one that should be brought before the serious notice of rulers and of the legal profession; and considers that the Medico-Legal Journal would be a good medium for the ventilation of the subject. They are written in consequence of the melancholy fact that men of notoriously immoral lives have been permitted, in certain places, to occupy high positions on the judicial bench.

It only needs very little reflection to see the incongruities and dangers which may and do arise when such a state of affairs is tolerated. A man who has the power of sending another to prison, if not of stainless life himself, is not very likely to be able to apportion the right amount of punishment to the delinquents who are convicted before him; and will very likely be too lenient to vices with which he is himself in sympathy, while to compensate for this he will be very severe on persons convicted of crimes of another character. In illustration of this the writer may mention the case of a judge reputed to be exceedingly immoral, who dealt very lightly with a man who was brought before him on a charge of bigamy and who, at the same session of the court,

sentenced a man convicted of larceny (it is admitted that he was an old offender) to penal servitude for twelve years. This judge had a great deal to say, while passing the latter sentence, about the duty that he owed to the public; apparently unconscious that one of the duties of his high position was to set such an example in all things that public confidence in his fitness for the office should not be shaken; nor vice encouraged by the spectacle of its being made light of by men appointed for the preservation of virtue. Such things are of far greater import than protecting the public from the depredations of a thief; albeit one whose past record shows him to be one who would put liberty to a bad use.

But it is not only in the direction of the administration of criminal law that the evils are apparent of allowing the immoral man to sit in the judicial chair. Many are the causes brought before our civil courts, which turn more or less on the immorality of one of the parties concerned, and where the law cannot be laid down, nor justice administered, without the presiding judge, if immoral himself, reprehending conduct from the bench as the like of which he is himself guilty. A certain judge, now dead, is reported to have separated from his wife and to have lived in open adultery with the wife of another man. Is such a man the right person to adjudicate on a case where a dissolution of marriage is sought for on the ground of adultery of one of the parties; and would the aggrieved party have confidence that the case will be impartially heard, when the presiding judge is a man who might himself be made a defendant in a similar action? Nor is this the whole extent of the evil; for unless immoral men are precluded from occupying seats on the bench, the possibility will arise (though, it is to be hoped, not the probability) of the whole of the judicial staff of a certain state being composed of men of this character, so that the would-be suitor cannot even secure that his cause shall be brought before a judge who is right-minded in his principles and conduct.

"*Ex turpia causa non oritur actio.*" Such is a maxim of the common law of England. But the immoral judge is in an invidious position when this maxim is pertinent; and he must either (assuming that he is not wilfully corrupt) be swayed and biased by his private sympathies; or in the administration of the law he must lay down principles of conduct at startling variance with his own actions; in other words, he must preach one thing while he practices another. Nor must the effect on the minds of the public be lost sight of when judges from their high position are heard to utter maxims including purity of life, when it is well known all the while that there is no greater vioaltor of the principles thus preached than the judge who utters them. Nor, on the other hand, is the case

made better if a sense of the inconsistency should stay the judge from enunciating those rules of virtue which it is the policy of the law to uphold no less than the interests of morality to guard. We should see the incongruity of allowing a thief to preside at the trial of a man charged with larceny; is it less inharmonious to see an adulterer trying a case of which the essence is the adultery of one of the parties?

Another, though minor consideration which arises in connection with the question, is the embarrassment which may be occasioned to advocates in pleading causes of a certain character before men of immoral lives. It is sometimes necessary for the advocate to reprehend in the strongest terms the conduct of some of the parties concerned in a case; and when the case turns upon infidelity in conjugal relations or deviations from virtue of a like nature, the advocate under the supposed circumstances may be painfully aware that in condemning the conduct of the parties he is condemning that of the judge who is hearing the case. It is to be hoped that there are not many members of the bar who would allow considerations of personal interest to interfere with the discharge of their solemn obligation to say all for their client that may reasonably be expected to aid his cause. Yet is it fair to the advocate that he should be exposed to the risk of offending by his plain speaking a man upon whose good will so much of his prospects in life may depend? He will need great boldness, sometimes, should he dare to rebuke laxity of morals at a tribunal where to utter such words would engender a consciousness that the presiding judge may construe them as an indirect reflection on the known facts of the judge's own life.

In other professions purity of morals is taken into consideration when deciding upon a man's fitness for an office of trust. To say nothing of the office of a clergyman, which is directly concerned with leading men to the contemplation of holy things, there are secular callings where the incongruity would be palpable of having the position filled by a man of loose life. A schoolmaster might have all the genius of Dr. Arnold for organization, discipline, and instruction; yet let him be without the high Christian principles of that great teacher, and never would he leave behind him a like example, or exercise so beneficent an influence over the pupils committed to his charge; and were he a man of known immorality, there are few parents who would be willing to trust their children to his care. An immoral professor of medicine would be shunned by the respectable part of the community, no matter how great his professional skill, and be regarded as an improper man to perform some of those delicate operations which it is at times necessary for the respectable practitioner to undertake. Is the office of administering justice

less sacred than those of training the young or of ministering to the wants of the sick, and can we better afford to disregard moral fitness for occupying the seat of judgment than when we are concerned with education or healing?

Christianity is said, in England, to be part of the law of the land; and although there is now no established church in the United States of America, in Ireland, or in the British colonies, we have nevertheless not so far lost faith in the superhuman origin of a certain record but that we still ask our judges, our jurymen, and our witnesses to swear by that record to discharge their duties to the best of their conscientous ability. Upon the volume which declares the Divine prohibition to be "Thou shalt not commit adultery" the adulterous judge invokes the aid of the Deity in the discharge of duties invoking possibly the condemnation of adultery. If such a state of things does not prejudice the administration of justice, it is at least no incentive towards the preservation of morals; and it will be an honorable distinction to the state which declares, (it may be that such are already existing) that unsullied purity of life shall be no less requisite to a seat on the judicial bench than educational ability to discharge the duties of the office:—*The Medico-Legal Journal.*

***

We take the liberty of extracting the following part of an address delivered at the unveiling of the Statue of Rufus Choate in the court house in Boston by Joseph H. Choate which will be found very interesting:—

* * * * *

And first, and far above his splendid talents and his triumphant eloquence, I would place the character of the man, pure, honest, delivered absolutely from all the temptations of sordid and mercenary things, aspiring daily to what was higher and better, loathing all that was vulgar and of low repute, simple as a child, and tender and sympathetic as a woman. Emerson most truly says that character is far above intellect, and this man's character surpassed even his exalted intellect, and, controlling all his great endowments, made the consummate beauty of his life. I know of no greater tribute ever paid to a successful lawyer, than that which he received from Chief Justice Shaw, himself an august and serene personality, absolutely familiar with his daily walk and conversation, in his account of the effort that was made to induce Mr. Choate to give up his active and exhausting practice, and to take the place of professor in the Harvard Law School, made vacant by the

death of Mr. Justice Story, an effort of which the Chief Justice, as a member of the corporation of Harvard, was the principal promoter. After referring to him then, in 1847, as "the leader of the Bar in every department of forensic eloquence," and dwelling upon the great advantages which would accrue to the school from the profound legal learning which he possessed, he said: "In the case of Mr. Choate, it was considered quite indespensable that he should reside in Cambridge, on account of the influence which his genial manners, his habitual presence, and the *force of his character*, would be likely to exert over the young man, drawn from every part of the United States to listen to his instructions."

What richer tribute could there be to personal and professional worth, than such words from such lips? He was the fit man to mould the characters of the youth, not of the city or the State only, but of the whole nation. So let the statue stand, as notice to all who seek to enter here, that the first requisite of all true renown in our noble prefession —renown not for a day or a life only, but for generations—is Character.

And next I would point to it is as a monument to self-discipline; and here he was indeed without a rival. You may search the biographies of all the great lawyers of the world, and you will find none that surpassed, I think none that approached him in this rare quality and power. The advocate who would control others must first, last and always control himself. "Every educated man," he once said, "should remember that 'great parts are a great trust,'" and, conscious of his talents and powers, he surely never forgot that. You may be certain that after his distinguished college career at Dartmouth—first always where there was none second—after all that the law school, and a year spent under the tuition of William Wirt, then at the zenith of his fame, could lend to his equipment, and after the five years of patient study in his office at Danvers, where he was the only lawyer, he brought to the subsequent actual practice of his profession an outfit of learning, of skill and research, which most of us would have thought sufficient for a lifetime. But with him it was only the beginning. His power of labor was inexhaustible, and down to the last hour of his professional life he never relaxed the most acute and searching study, not of the case in hand only, but of the whole body of the law, and of everything in history, poetry, philosophy and literature that could lend anything of strength and lustre to the performance of his professional duties. His hand, his head, his heart, his imagination were never out of training. Think of a man already walking the giddy heights of assured success, already a senator of the United States from Massachusetts, or even years afterwards, when the end of his professional labors was already in sight,

schooling himself to daily tasks in law, in rhetoric, in oratory, seeking always for the actual truth, and for the "best language" in which to embody it—"the precisely one right word" by which to utter it—think of such a man, with all his ardent taste for the beautiful in every domain of human life, going through the grinding work of taking each successive volume of the Massachusetts Reports as they came out, down to the last year of his practice, and making a brief in every case in which he had not been himself engaged, with new researches to see how he might have presented it, and thus to keep up with the procession of the Law. Verily "all things are full of labor; man cannot utter it: the eye is not satisfied with seeing, nor the ear filled with hearing."

So let no man seek to follow in his footsteps, unless he is ready to demonstrate in his own person, that infinite work is the only touchstone of the highest standing in the law, and the sluggard and the slothful who enter here must leave all hope behind.—*The Green Bag.*

***

*Officialdom* in Germany has been compelled by a bicyclist to give deep thought to the question, "When two streets intersect, in which street is the point of intersection?". At Breslau, bicyclists are forbidden on certain streets. A rider, going along a street where they are allowed, followed it across a prohibited street, and was arrested in the middle of the road. He asserted that he was in one street, the policeman that he was in the other, the lower court that he was in neither, and should not be fined; and the upper court that he was in both, therefore on the forbidden street, and must pay twenty-five cents.—*The Green Bag.*

***

*William M. Evarts*:—"*A Great* corporation once desired a legal opinion on a matter involving millions of dollars, for upon it practically depended that corporation's very existence. They decided to refer the question, which was wholly one of the correct interpretation of law, to William M. Evarts, and to be guided by his opinion. Evarts's reputation and success are wholly due to his remarkable knowledge of law, and his power, which seems almost like intuition, of determining just how the Supreme Court will decide any question of law. When the attorney for the great corporation put his question, Evarts sat buried in thought for a moment, and then answered in one word, 'Yes.' His bill for that one word was two hundred and fifty thousand dollars, and the corporation paid it without a murmur, Evarts's answer proved to be correct." It is a good story, anyway.—*The Green Bag.*

# REVIEWS.

*The Lawyer and Magistrate* (Monthly). Published by Joseph Dollard, Wellington Quay, Dublin: Annual subscription, 10*s.* 6*d.* :— We gladly welcome our new contemporary to our exchange list. We have received the first two numbers of this Journal and find them highly useful. It is a monthly Magisterial Journal and a legal review of reviews and if we can judge of the character of the Journal from the two numbers before us, the contents will be as interesting as they are varied. The Journal publishes reports of criminal cases in England, Ireland and Scotland, leading articles upon current topics of interest, summaries of articles in other legal Journals, besides a number of other articles upon miscellaneous topics. We hope the Journal will maintain the standard of excellence promised by the opening numbers, and feel sure that will be welcomed by lawyers and magistrates in this country as well as in the United Kingdom.

---

*Kelly's Draftsman,* by West and Austin, 3rd Edition. Published by *Butterworth & Co., 7, Fleet Street, London, E.C.*: Price, 12*s.* 6*d.* :— This is an excellent little hand-book of conveyancing, and the variety of forms given in the book is far more extensive than any that we have seen within the compass of a hand-book. Many of the forms given in the book are not found in ordinary works on conveyancing. Besides giving forms on the familiar subjects of sales, mortgages, leases, settlements, wills and bonds, the book contains a number of miscellaneous forms which are sure to be appreciated by students. The book ought to be in the hands of every student of conveyancing who is in search of a useful hand-book on the subject.

The Madras Law Journal.

PART II.] FEBRUARY 1899. [VOL. IX.

UNIVERSITY LIBRARY LAW COLLEGE

## RECENT LEGISLATION.

We propose to notice in this article the provisions of some of the enactments placed on the statute book during the present session of the Viceregal Council, namely, The Indian Contract Amendment Act of 1899 and the Indian Arbitration Act of 1899. The main object with which the amendments of the Contract Act have been introduced is to give relief to persons who have been led into extortionate bargains in some of the cases in which the present law is supposed to be incapable of giving adequate relief. It is also expected that these amendments may be of special benefit to the agricultural classes in the country who are in a state of chronic indebtedness. The subject of agricultural indebtedness has been long engaging the attention of the Government, and they have been urged to introduce special legislation for the relief of agriculturists by an extension of the Deccan Agriculturists' Relief Act and by the imposition of restrictions upon the alienation of land. These and other special remedies have been rejected by the Government after careful consideration, and it has been considered sufficient to extend the definition of "undue influence" contained in the Act of 1872, so as to embrace cases which have been recognized by the English Courts as savouring of undue influence. The principle of freedom of contract is not interfered with, but in ascertaining the preliminary question whether the parties are really free, the Courts will under the amending Act be eutitled to take into consideration circumstances which under the Act of 1872 did not very much weigh with the Courts. The question when the consent of a party to a contract can be said to be free was determined under the old Act by somewhat narrow, if workable, tests. Once these tests are set aside and broader tests adopted, the determination of the character of consent is likely to become a matter of discretion and to give rise to some amount of uncertainty in the application of the law, like

any other question of discretion. The question of freedom is essentially a question of degree; and different views are likely to be taken by different people as to whether the parties to a contract were or were not free in the fullest sense of the term. How far a person may legitimately take advantage of another's necessities is a matter upon which it will be difficult to lay down any satisfactory rule of law. From an ethical point of view, it may, no doubt, be said, no one ought to take advantage of the necessities of others. But for the legislator who has to deal with the actual conditions of society, it would be an impossible counsel of perfection. Our modern system of political economy which recognizes the principle of buying in the cheapest and selling in the dearest market is practically based upon the assumption that it is permissible to take advantage of others' necessities. The definition of freedom of consent is thus beset with difficulties; but it does not follow that the Legislature should be deterred by them from attempting to give relief as far as practicable. There are numerous cases in which it will be possible to come to the conclusion that there has been an exercise of undue influence, though it may not be easy to lay down the definition of undue influence in the abstract. The safest course for the Courts as well as the Legislature would be to move on the lines which have been laid down by the English decisions. It has often been held that the Contract Act of 1872 is not an exhaustive treatment of the law of contracts, as the Act itself merely professes to define and amend certain parts of the law relating to contracts. It has often been laid down by the Privy Council and by the High Courts in India that the Indian Courts were at liberty to follow the English cases and give relief in cases not reached by the Contract Act. Notwithstanding this discretionary power, the Courts sometimes imagine themselves to be confined within the four corners of the Contract Act and have hesitated to award relief, where they could have safely relied upon the authority of English precedents. Only a few weeks ago, a learned Judge of the Madras High Court sitting on the Original Side was unwilling to hold that a plea of a catching bargain with an expectant heir could be set up in this country in the absence of any circumstances bringing the case within the definition of undue influence in the Act of 1872. While the learned Judge conceded that the law in England recognized such a plea, he maintained that the law in India was different and that the difference was demonstrated by the

fact that the Legislature had thought it necessary to introduce the new amendments. Such a remark coming from a Judge of the High Court is a somewhat significant commentary upon the hopes and fears expressed in the Viceregal Council as to the mode in which the amending Act was likely to be worked by the Courts in this country. Notwithstanding, however, all the difficulties surrounding the question, we think the amendment is a move in the right direction, though in some respects it does not go far enough.

S. 16 of the Contract Act of 1872 is repealed, and the following definition is substituted in its place :—

"A contract is said to be induced by undue influence where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other."

We do not think that the language used in the amending section is sufficiently apt to convey the meaning of the Legislature. The language suggests that there must be some antecedent relationship subsisting between the parties to the contract, in virtue of which one of them is able to dominate the will of the other. Neither clause 2 of the section, nor the illustrations to it, carry the matter any further than the old Act. Cases may occur in which the antecedent relationship between the parties does not fall under clause 2 ; as, for instance, where a zamindar enters into an unconscionable bargain with his ryots. And in these cases the new section may enable the Courts to give relief. There are, however, several classes of cases in which the contract is set aside by the Courts of Equity on the ground of undue influence, notwithstanding the absence of any antecedent relationship between the parties. In the case of catching bargains with expectant heirs and reversioners, there is no antecedent relationship ; and yet the Courts of Equity have interfered to set aside these contracts. Cases of the type of *Aylesford* v. *Morris*, L. R. 8 Ch. 484, cannot be reached even by the amended section. The liberty possessed by the Indian Courts of following the English precedents where the Act furnishes no guidance is still left to them and one can only hope that the result of the amendments will not be to leave the Courts to suppose that they cannot travel beyond the provisions of the Act.

The next important provision of the amending Act is the amendment of S. 74. The amending section provides that if a contract contains any other stipulation by way of penalty, reasonable compensation alone should be awarded. The explanation provides that a stipulation for increased interest from the date of default may be a stipulation by way of penalty. The old Act expressly avoided the use of the word 'penalty' with a view to get rid of the nice distinctions drawn by English Courts between penalties and liquidated damages. There was no doubt, however, that in cases of provisions which were really penalties the Courts in India could interfere and give relief. The insertion of the clause that we have referred to serves no purpose, except that of being, as pointed out by Sir Griffith Evans, a peg to hang certain illustrations on. The explanation, however, will serve a really useful purpose, as many cases of extortionate bargains have evaded the present law by reason of the provision that the enhanced rate of interest shall be payable only from the date of default. We share the hope expressed by Sir Griffith Evans that this inartistic piece of legislation will make up in utility what it lacks in beauty.

The Arbitration Act is almost a *verbatim* reproduction of the English Arbitration Act of 1889,(52 and 53 Vic. ch. 49). It is intended to codify the law relating to arbitrations out of court. The Act is in the first instance intended to apply only in cases where if the matter of the arbitration were the subject of a suit, the suit could, whether with leave or otherwise, be instituted in a Presidency Town.

We wish to point out one or two matters in regard to which the Act appears to us to be defective. S. 11 of the Act recognises an arbitrator's lien upon the award for payment of fees and charges due in respect of the fees and charges payable in respect of the arbitration and award. The section does not state whether in the absence of any agreement an arbitrator would be entitled to remuneration for his trouble, and, if so, to any lien therefor. We presume, however, that the section only contemplates cases where the fees are payable only by agreement of parties and not cases in which an arbitrator claims remuneration in the absence of any agreement. The general rule is that the appointment of an arbitrator on a reference by consent is not of such a nature as to raise

an implied promise to pay him a reasonable compensation. Russel on Awards, 7th edn., p. 492. It has been recently held in England that in mercantile references there is an implied promise to pay fees to an arbitrator. Where there is such an implied promise for remuneration to the arbitrator and he demands an excessive fee, there ought to be some means provided for summarily determining the amount to which the arbitrator is entitled and compelling him to deliver up the award on payment of the amount so determined. We must express our regret that the Council did not see fit to adopt the amendment of the Honorable Mr. Ananda Charlu providing for the enforcement of the attendance of witnesses. A party may be justified in believing at the time of his submission that his witnesses would voluntarily attend and give evidence and produce documents. The witnesses may subsequently prove unwilling to attend. And if a party had no means of enforcing their attendance, he would be left completely helpless and the arbitrators would not have the materials necessary for a just determination of the dispute. Arbitrators should not, as a rule, dispose of cases in the technical way that the regularly constituted Courts are obliged to do, and it would be deplorable if arbitrators decided cases against parties simply because they fail to attend at the proper time, or their witnesses did not turn up in time, or the parties have been guilty of some slight and similar irregularity. The English Arbitration Act, S. 18, gives the court power to compel the attendance of witnesses before an arbitrator or umpire, and this provision might have been adopted in our Act with advantage. The Act provides that in the absence of any agreement to the contrary the parties should be bound by the provisions in the first schedule. The provision in regard to the time within which an arbitrator or umpire should make his award appears to be very unsatisfactory. Under clauses 3 and 5 of the schedule it is open to the arbitrator or umpire to extend the time for making the award indefinitely depriving the parties of the benefit of the arbitration and of the right to resort to the ordinary civil courts for redress. It may no doubt be urged that it is open to the parties to make a distinct arrangement as to the time. But we think that in the large majority of cases there will be no specific agreement about the time and the provisions of the schedule may produce hardship. Some limitation should be placed upon the time

for making the award by fixing the maximum length of time and by providing that any extension beyond that should be made only with the consent of both the parties.

---

## BANDHUS.—II.

We have seen in our former article (*vide* 8 M. L. J., p. 313) who the bandhus generally are and who are meant by or fall under that description. We now propose to consider who your (one's) bandhus are. This inquiry is quite different from the one we have already considered, *viz.*, who fall under the denomination of or, what is denominated by the term 'bandhu'. *Your bandhus* are of 3 classes.

(1) *your own;* (2) *your father's;* (3) *your mother's.*

These are as stated by Vriddha Satatapa the following:—

The sons of one's father's sister (paternal aunt), the sons of one's mother's sister (maternal aunt), and the sons of one's mother's brother (maternal uncle) must be considered to *be one's own cognate kindred; i.e., one's own bandhus*:

The sons of the father's paternal aunt (father's father's sister), the sons of the father's maternal aunt (father's mother's sister), and the sons of the father's maternal uncle (father's mother's brother) must be considered to *be the father's bandhus or cognate kindred.*

The sons of the mother's paternal aunt, the sons of the mother's maternal aunt and the sons of the mother's maternal uncle must be considered to *be the mother's bandhus or cognate kindred.*

The mother's brother, the father's mother's brother, the mother's mother's brother must be held to be impliedly included; for if their sons are bandhus to the propositus, the fathers who are more nearly related to the propositus must also be bandhus. If the sons are sapindas, the fathers must necessarily be sapindas, for as was shown before (in our former article) if the fathers are not sapindas how can their sons be sapindas; for it is through their fathers, particles of the body are transmitted (*vide* also *Gridhari Lal Roy* v. *The Bengal Government*, 12 M. I. A., p. 448).

We therefore see that, according to the Mitakshara, your *heritable* bandhus are—

I. Your *own* bandhus (mark the word '*own*').

II. Your father's bandhus (mark the absence of the word 'own').

III. Your mother's bandhus (mark again the absence of the word '*own*').

In other words, your bandhus are your *atma* bandhus, your *pitri* bandhus, and your *matri* bandhus. Here it must be noted that the Mitakshara makes *your father's* bandhus and *your mother's* bandhus as *your* bandhus, and that the author speaks of *father's* bandhus not simply of *father's own*, and *mother's* bandhus not simply of *mother's own*. At the same time it is also significant to note that the Mitakshara does not speak of *grandfather's* (or father's father's) bandhus generally and as such and grandmother's *mother's mother's* bandhus generally and as such, *your* bandhus. The inference naturally suggests itself that as the author speaks of *father's* bandhus generally and as he has already divided *your bandhus* into three classes as *your own*, *your father's* and *your mother's*, the author intended that the *father's bandhus* should also be further divided into three, as *father's own bandhus*, *father's father's bandhus* and *father's mother's bandhus*. It must be noted that when the author has clearly divided one's bandhus into three classes and makes a marked distinction between *one's own bandhus* and *one's bandhus* generally, it is nothing but natural and reasonable to infer that when he speaks of *father's bandhus* generally (and not of *father's own simply*) he does not limit himself to the class of *father's own* (though the illustrations give only instances of father's own) but intends also to include *father's father's* and *father's mother's*. Similarly *mother's bandhus* should also be divided into *mother's own*, *mother's father's* and *mother's mother's*.

In enumerating persons by way of sample, the author gives as comprised in the term *your bandhus*, examples of

(*a*) Your own bandhus.

(*b*) Your father's own bandhus.

(*c*) Your mother's own bandhus.

Now as all *Pitri* bandhus are *your* bandhus and as the author of the Mitakshara, or rather Vriddha Satatapa, understands *your* bandhus (when *illustrating* merely) as *your own, your father's own* and *your mother's own,* it follows as a logical result that under the terms *Pitri* bandhus he also meant to include:

(*A*) *Pitri atma* or your father's own.

(*B*) *Pitri pitri atma* or your father's father's own.

(*C*) *Pitri matri atma bandhu* or your father's mother's own.

The question is whether we ought to place a limit to the father's pitri bandhus. We have already taken the father's father's own by the analogy of the illustrations appearing from the context of Vriddha Satatapa. But the further question arises whether we ought to go beyond and divide father's pitri bandhus into (1) father's own, (2) father's pitri bandhus, and (3) father's matri bandhus, and then go on again to divide class (B) as (1) father's father's own, (2) father's father's pitri bandhus, and (3) father's father's matri bandhus, and so on, *ad infinitum* (as respects the pitri and matri bandhus of each class) and class (C) as (1) father's mother's own, (2) father's mother's pitri bandhus, and (3) father's mother's matri bandhus, and so on.

It has been already pointed out that the author of the Mitakshara does not speak of *grandfather's bandhus* and *grandmother's bandhus* as *your bandhus.* He *only* says that the *father's bandhus* and *mother's bandhus* are *your bandhus.* It is, therefore, to be apprehended that the grandfather's bandhus *generally* were not mentioned in order that they may be taken out of the category of *your bandhus.* The suggestion finds ample support from the fact that Apararaka, a commentator on the Mitakshara, intended to exclude and did exclude even the *father's bandhus* and *mother's bandhus* generally from the category of *your bandhus.* (See Mitakshara, Colebrooke's Translation edition of Tarkalankara, p. 364 note.) And though his doctrine is elaborately controverted by the author of the Vyavahara Mayukha (see Stokes' Hindu Law Books, p. 89, chapter IV, sec. VIII, pl. 22 and 23) and is not accepted by the other writers, it shows that there was some limit intended to be given '*to your* (*heritable*) *bandhus,*' that while Apararaka

wanted to exclude the father's and mother's bandhus in toto, yet other authors and commentators only intended to exclude all persons beyond the father's and mother's bandhus generally.*

The Mitakshara says:—The *father's* own *bandhus* are your bandhus, and so the father's father's own bandhus are your father's and consequently also your bandhus. But the father's father's pitri bandhus are more related to your grandfather or rather great grandfather (and through him to your father) and as your grandfather's pitri bandhus as such are not mentioned as having a heritable right to you, they are not your bandhus.

The father's sister's son *who is expressly mentioned in the Mitakhsara as one's atma bandhu* is really also the grandfather's bandhu, for he is the grandfather's daughter's son. Similarly the father's father's sister's son *who is expressly mentioned as being one's pitri bandhu* is also the grandfather's bandhu, for he is the grandfather's father's (or great-grandfather's daughter's son). It must not therefore be said that the father's father's own bandhus, *viz.*, the father's father's father's sister's son, &c., are not *your bandhus,* though they are also the *grandfather's bandhus.* No doubt just as the father's sister's son and father's father's sister's son are also grandfather's bandhus, though they are pre-eminently one's atma bandhus, and pitri bandhus, so the father's father's father's own bandhus are the father's pre-eminently and are your pitri bandhus. Though, therefore, a given person may be a bandhu of several persons, yet he is by nearness or proximity of kindred pre-eminently and specially related to those near to him in blood. The fact, therefore that the father's father's father's sister's son, &c., are also the grandfather's bandhus is of no avail to disentitle them to be *your bandhus* when they are more nearly related to the father directly. Likewise it is of no avail to say a person is *your bandhu* when he is

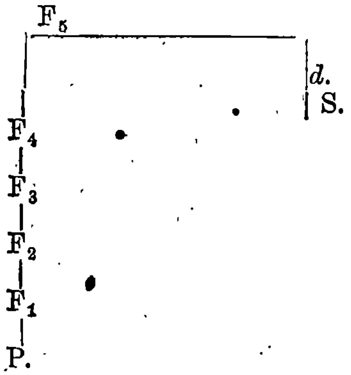
* It is also useful to observe here that the bandhus were themselves not admitted as *heirs* by Apastamba as no mention is made therein of them (Sacred Books of the East Apastamba, Vol. II, Part II, p. 132, 133 Pr. 2 Patala 6, Khanda 14, verses 2 and 3). Even in Manu they are not mentioned though Kulluka and Raghunandana are not inclined to adopt this view. (See Sacred Books of the East, pp. 367 and 368, note to chapter IX, verse 187), *vide* Mayne, para. 495, page 619. *Vide* also Vasishta., ch. XVII, verse 79 (Sacred Books of the East, Vol. XIV, and Baudhayana Pr. Ad, 1 and 5, Kan. II, verses 11, 12 and 13, Sacred Books of the East, Vol. XIV, p. 179.)

your grandfather's bandhu simply and not nearly related to your father.

There is yet another reason why the grandfather's pitri bandhus ought not to be considered as having heritable rights. The grandfather's pitri bandhus are—

Father's father's father's. { (a) Father's sister's son.
(b) Mother's sister's son.
(c) Mother's brother's son. }

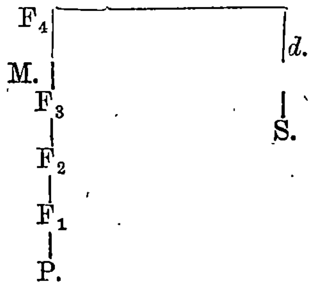
(a) Let us take father's father's father's father's sister's son and see whether he is a sapinda relation to the propositus.




Here S. is not a sapinda of P, as P is beyond 5 degrees of $F_5$ the maternal grandfather of S.

(b.) Father's father's father's mother's sister's son.

Do. do. do. do. brother's son.




Here $F_4$ himself the maternal grandfather of S. is not the sapinda of P., for P. is beyond 5 degrees of $F_4$ (P. being a descendant of the daughter's line of $F_4$.)

Therefore his ($F_4$'s) daughter's son or son and grandson cannot have any heritable rights and are not sapindas.

We have thus found 7 groups of heritable bandhus. These are—

CLASS I. *Atma Bandhus.*

| | |
|---|---|
| GROUP I. Your own bandhus. These are as stated by the author of the Mitakshara. | (*a*) Father's sister's son.<br>(*b*) Mother's sister's son.<br>(*c*) Mother's brother (stated by Viramitrodaya).<br>(*d*) Mother's brother's son. |

CLASS II. *Pitri Bandhus.*

These are groups II, III and IV.

| | |
|---|---|
| GROUP II. Father's own. | (*a*) Father's father's sister's son.<br>(*b*) Father's mother's sister's son.<br>(*c*) Father's mother's brother.<br>(*d*) Father's mother's brother's son. |
| GROUP III. Father's father's own. | (*a*) Father's father's father's sister's son.<br>(*b*) Father's father's mother's sister's son.<br>(*c*) Father's father's mother's brother<br>(*d*) Father's father's mother's brother's son. |
| GROUP IV. Father's mother's own. | (*a*) Father's mother's father's sister's son.<br>(*b*) Father's mother's mother's sister's son.<br>(*c*) Father's mother's mother's brother.<br>(*d*) Father's mother's mother's brother's son. |

CLASS III. *Matri Bandhus.*

These are Groups V, VI and VII.

| | |
|---|---|
| GROUP V. Mother's own. | (*a*) Mother's father's sister's son.<br>(*b*) Mother's mother's sister's son.<br>(*c*) Mother's mother's brother.<br>(*d*) Mother's mother's brother's son. |
| GROUP VI. Mother's father's own. | (*a*) Mother's father's father's sister's son.<br>(*b*) Mother's father's mother's sister's son.<br>(*c*) Mother's father's mother's brother.<br>(*d*) Mother's father's mother's brother's son. |
| GROUP VII. Mother's mother's own. | (*a*) Mother's mother's father's sister's son.<br>(*b*) Do mother's sister's son.<br>(*c*) Do mother's brother.<br>(*d*) Do mother's brother's son. |

Mutual right of inheritance is, as we have seen, the essence of the Mitakshara scheme of inheritance. Hence the propositus will

be the heir of all the persons mentioned in the 7 groups. We shall therefore have by correlation the following persons :—

CLASS I. *Atma Bandhus.*

GROUP I. The correlations are—

(*a*) Mother's father's son's son, same as original (d).
(*b*) Mother's father's daughter's son, do do (b).
(*c*) Father's daughter's son.
(*d*) Father's father's daughter's son, same as original (a).

CLASS II. *Pitri Bandhus.*

GROUP II. *Father's own Bandhus.*

(*a*) Mother's father's son's son's son.
(*b*) Mother's father's daughter's son's son.
(*c*) Father's daughter's son's son.
(*d*) Father's father's daughter's son's son.

GROUP III. *Father's Pitri Bandhus.*

(*a*) Mother's father's son's son's son's son.
(*b*) Mother's father's daughter's son's son's son.
(*c*) Father's daughter's son's son's son.
(*d*) Father's father's daughter's son's son's son.

GROUP IV. *Father's Matri Bandhus.*

(*a*) Mother's father's son's daughter's son's son.
(*b*) Mother's father's daughter's daughter's son's son.
(*c*) Father's daughter's daughter's son's son.
(*d*) Father's father's daughter's daughter's son's son.

CLASS III. *Matri Bandhus.*

GROUP V. *Mother's own Bandhus.*

(*a*) Mother's father's son's daughter's son.
(*b*) Mother's father's daughter's daughter's son.
(*c*) Father's daughter's daughter's son.
(*d*) Father's father's daughter's daughter's son.

GROUP VI. *Mother's Pitri Bandhus.*

(*a*) Mother's father's son's son's daughter's son.
(*b*) Mother's father's daughter's son's daughter's son.
(*c*) Father's daughter's son's daughter's son.
(*d*) Father's father's daughter's son's daughter's son.

Group VII. *Mother's Matri Bandhus.*

(*a*) Mother's father's son's daughter's daughter's son.
(*b*) Mother's father's daughter's daughter's daughter's son.
(*c*) Father's daughter's daughter's daughter's son.
(*d*) Father's father's daughter's daughter's daughter's son.

We have seen in some detail the persons who fall under these classes and groups. It may be noted that among these no person beyond 5 degrees comes in as bandhu.

We shall now determine the families in which these bandhus are to be found. They will be found in the children of the daughters born of the propositus's own family and in foreign families. Those foreign families and their lines we shall now determine from the several groups and correlations.

From the originals mentioned above, we get these families.

Group I.

(*a*) Father's father's daughter's son's line or family.
(*b*) Mother's father's daughter's son's line.
(*c*) Mother's father's line.
(*d*) Do. do. do.

Group II.

(*a*) Father's father's father's daughter's son's line.
(*b*) Father's mother's father's daughter's son's line.
(*c*) Father's mother's father's line.
(*d*) Do. do. do.

Group III.

(*a*) Father's father's father's father's daughter's son's line.
(*b*) Father's father's mother's father's daughter's son's line.
(*c*) Father's father's mother's father's line.
(*d*) Do. do. do.

Group IV.

(a) Father's mother's father's father's daughter's son's line.

(b) Father's mother's mother's father's daughter's son's line.

(c) Father's mother's mother's father's line.
(d) Do. do. do.

Group V.

(a) Mother's father's father's daughter's son's line.
(b) Mother's mother's father's daughter's son's line.
(c) Mother's mother's father's line.
(d) Do. do. do.

Group VI.

(a) Mother's father's father's father's daughter's son's line.

(b) Mother's father's mother's father's daughter's son's line.

(c) Mother's father's mother's father's line.
(d) Do. do. do.

Group VII.

(a) Mother's mother's father's father's daughter's son's line.

(b) Mother's mother's mother's father's daughter's son's line.

(c) Mother's mother's mother's father's line.

(d) Do. do. do.

The correlations mentioned above give us—

Group I.

(a) Mother's father's line.
(b) Mother's father's daughter's son's line.
(c) Father's daughter's son's line.
(d) Father's father's daughter's son's line.

Group II.

(*a*) Mother's father's line.
(*b*) Mother's father's daughter's son's line.
(*c*) Father's daughter's son's line.
(*d*) Father's father's daughter's son's line.

Group III.

(*a*) Mother's father's line.
(*b*) Mother's father's daughter's son's line.
(*c*) Father's daughter's son's line.
(*d*) Father's father's daughter's son's line.

Group IV.

(*a*) Mother's father's son's daughter's son's line.
(*b*) Mother's father's daughter's daughter's son's line.
(*c*) Father's daughter's daughter's son's line.
(*d*) Father's father's daughter's daughter's son's line.

Group V.

(*a*) Mother's father's son's daughter's son's line.
(*b*) Mother's father's daughter's daughter's son's line.
(*c*) Father's daughter's daughter's son's line.
(*d*) Father's father's daughter's daughter's son's line.

Group VI.

(*a*) Mother's father's son's son's daughter's son's line.
(*b*) Mother's father's daughter's son's daughter's son's line.
(*c*) Father's daughter's son's daughter's son's line.
(*d*) Father's father's daughter's son's daughter's son's line.

Group VII.

(*a*) Mother's father's son's daughter's daughter's son's line.
(*b*) Mother's father's daughter's daughter's daughter's son's line.
(*c*) Father's daughter's daughter's daughter's son's line.
(*d*) Father's father's daughter's daughter's daughter's son's line.

We have therefore *one's own family* and *the foreign families.* Probably the expression *one's own family* is not quite accurate. This refers to the families of the daughters born in the propositus's own family. For want of a concise terminology the above expression is used.

As *regards one's own family,* see I (*a*), I (*c*) cor., I (*d*) cor., II (*a*), II (*c*) cor., II (*d*) cor., III (*a*), III (*c*) cor., III (*d*) cor., IV (*c*) cor., IV (*d*) cor., V (*c*) cor., V (*d*) cor., VI (*c*) cor., VI (*d*) cor., VII (*c*) cor., VII (*d*) cor.

The foreign families are—

1. *Mother's father's family.*

   I (*a*) cor., I (*b*), cor., I (*c*), I (*d*).
   II (*a*) cor., II (*b*) cor.
   III (*a*) cor., III (*b*) cor.
   IV (*a*) cor., IV (*b*) cor.
   V (*a*), V (*a*) cor., V (*b*) cor.
   VI (*a*), VI (*a*) cor., VI (*b*) cor.
   VII (*a*) cor., VII (*b*) cor.

2. *Father's mother's father's family.*
   II (*b*), II (*c*), II (*d*), IV (*a*).

3. *Father's father's mother's father's family.*
   III (*b*), III (*c*), III (*d*).

4. *Father's mother's mother's father's family.*
   IV (*b*), IV (*c*), IV (*d*).

5. *Mother's mother's father's family.*
   V (*b*), V (*c*), V (*d*), VII (*a*).

6. *Mother's father's mother's father's family.*
   VI (*b*), VI (*c*), VI (*d*).

7. *Mother's mother's mother's father's family.*
   VII (*b*), VII (*c*), VII (*d*).

The *foreign families* are therefore seven.

(1) Mother's father's family.
(2) Father's mother's father's family.
(3) Father's father's mother's father's family.
(4) Father's mother's mother's father's family.
(5) Mother's mother's father's family.
(6) Mother's father's mother's father's family.
(7) Mother's mother's mother's father's family.

Taking one's own family also (*i.e.*, the families of the daughters born in the family who are treated as one class) we have eight families in which the bandhus are to be found.

We shall now determine the lines in the various families in which the various bandhus are to be found. These will be obtained by the correlations of the various foreign families.

| *Original.* | *Correlation.* |
| --- | --- |
| 1. Mother's father's family.<br>F.<br>\|<br>M.<br>\|<br>P. | Sons of daughters born of the eligible families.<br>D.<br>\|<br>S. |
| 2. Father's mother's father's family.<br>F.<br>\|<br>M.<br>\|<br>F.<br>\|<br>P. | Sons of sons of daughters born of the eligible families.<br>D.<br>\|<br>S.<br>\|<br>S. |
| 3. Father's father's mother's father's family.<br>F.<br>\|<br>M.<br>\|<br>F.<br>\|<br>F.<br>\|<br>P. | Sons of sons of sons of daughters born of the eligible families.<br>D.<br>\|<br>S.<br>\|<br>S.<br>\|<br>S. |

4. Father's mother's mother's father's family.

F.<br>|<br>M.<br>|<br>M.<br>|<br>F.<br>|<br>P.

Sons of sons of daughters of daughters born of the eligible families.

D.<br>|<br>D.<br>|<br>S.<br>|<br>S.

5. Mother's mother's father's family.

F.<br>|<br>M.<br>|<br>M.<br>|<br>P.

Sons of daughters of daughters born of the eligible families.

D.<br>|<br>D.<br>|<br>S.

6. Mother's father's mother's father's family.

F.<br>|<br>M.<br>|<br>F.<br>|<br>M.<br>|<br>P.

Sons of daughters of sons of daughters born of the eligible families.

D.<br>|<br>S.<br>|<br>D.<br>|<br>S.

7. Mother's mother's mother's father's family.

F.<br>|<br>M.<br>|<br>M.<br>|<br>M.<br>|<br>P.

Sons of daughters of daughters of daughters born of the eligible families.

D.<br>|<br>D.<br>|<br>D.<br>|<br>S.

Here again we see from these originals and their various correlations that we do not go lower down than what is indicated below. The lines may therefore be expressed thus—

| (1) | (2) | (3) | (4) | (5) | (6) | (7) |
|---|---|---|---|---|---|---|
| D. | D. | D. | D. | D. | D. | D. |
| \| | \| | \| | \| | \| | \| | \| |
| S. | S. | D. | S. | D. | S. | D. |
| | \| | \| | \| | \| | \| | \| |
| | S. | S. | S. | S. | D. | D. |
| | | | \| | \| | \| | \| |
| | | | S. | S. | S. | S. |

In the foreign families we have two more—

(*a*) The male ancestors who are within 5 degrees of the propositus.

(*b*) Their male agnatic descendants who are also within 5 degrees.

I. *Thus we have in one's own family*—

10 bandhus in the line of the propositus.

11 bandhus each in the line of the father, grandfather, great-grandfather and great-great-grandfather.

Total 54 male bandhus.

For instance, we have in the father's line.

1. Daughter's son.
2. Daughter's son's son.
3. Son's daughter's son.
4. Daughter's daughter's son.
5. Daughter's son's son's son.
6. Son's daughter's son's son.
7. Son's son's daughter's son.
8. Daughter's son's daughter's son.
9. Daughter's daughter's son's son.
10. Son's daughter's daughter's son.
11. Daughter's daughter's daughter's son.

In the case of the propositus, we must exclude the daughter's son who by reason of express texts comes immediately after the widow and daughter and before the parents in the Gotraja succession.

II. Then in the *mother's father's family*—

16 bandhus each in the line of the maternal grandfather, maternal great-grandfather and maternal great-great-grandfather.

Total 48 male bandhus.

For instance we have in the maternal grandfather's line.
1. The maternal grandfather.
2. The 4 descendants of the maternal grandfather in the agnatic line.
3. The 11 persons mentioned as already (*vide* one's own family—father's line).

III. *Father's mother's father's family*—

16 bandhus each in the line of the father's maternal grandfather and great-grandfather.

Total 32 male bandhus.

IV. *Father's father's mother's father's family*—

16 bandhus in the line of the father's father's maternal grandfather.

V. *Father's mother's mother's father's family*—

16 bandhus in the line of the father's mother's maternal grandfather.

VI. *Mother's mother's father's family*—

16 bandhus each in the line of the mother's maternal grandfather and the mother's maternal great-grandfather.

Total 32 male bandhus.

VII. *Mother's father's mother's father's family*—

16 bandhus in the line of the maternal grandfather's maternal grandfather.

VIII. *Mother's mother's mother's father's family*—

16 bandhus in the line of the mother's maternal grandmother's father.

Thus there are in all 230 male bandhus.

We shall arrange for purposes of convenience the above into the several classes and groups (making special reference to the distinction of *paterna* and *materna*, which will appear later on.).

---

CLASS I.—*Atma Bandhus.*

Total No. 48.

(*A*) *Ex-Parte Paterna.*

These are the 10 bandhus in the line of the propositus and 11 bandhus each in the lines of the father and grandfather. Total 32 bandus.

(*N.B.*—Throughout the relationship is to the propositus—for brevity we don't repeat propositus. If we say father, grandfather, &c., it is the father, grandfather, &c., of the propositus.)

(*B*) *Ex-Parte Materna.*

The 16 bandhus in the line of the maternal grandfather.

Total of A & B = 48 bandhus.

---

CLASS II.—*Pitri Bandhus.*

Total No. 86.

(*C*) Pitri Atma bandhus *Ex-Parte Paterna.*

The 11 bandhus in the line of the paternal great-grandfather.

(*D*) Pitri Atma Bandhus *Ex-Parte Materna.*

The 16 bandhus in the line of the father's maternal grandfather.

C & D = 27.

(*E*) Pitri Pitri Atma Bandhus *Ex-Parte Paterna.*

The 11 bandhus in the line of the paternal great-great-grand father.

(*F*) Pitri Pitri Atma Bandhus *Ex-Parte Materna.*

The 16 bandhus in the line of the father's father's maternal grandfather.

E & F = 27.

(*G*) Pitri Matri Bandhus *Ex-Parte Paterna.*

The 16 bandhus in the line of the father's maternal great-grandfather or (father's mother's paternal grandfather).

(*H*) Pitri Matri Bandhus *Ex-Parte Materna.*

The 16 bandhus in the line of the father's mother's maternal grandfather.

G & H = 32.

Total of C, D, E, F, G & H = 86.

---

CLASS III.—*Matri Bandhus.*

Total No. 96.

(*I*) Matri Atma Bandhus *Ex-Parte Paterna.*

The 16 bandhus in the line of the father of the maternal grandfather (or the mother's paternal grandfather).

(*J*) Matri Atma Bandhus *Ex-Parte Materna.*

The 16 bandhus in the line of the mother's maternal grandfather.

I & J = 32.

(*K*) Matri Pitri Bandhus *Ex-Parte Paterna.*

The 16 bandhus in the line of the mother's paternal great-grandfather.

(*L*) Matri Pitri Bandhus *Ex-Parte Materna.*

The 16 bandhus in the line of the mother's father's maternal grandfather.

K & L = 32.

(*M*) Matri Matri Bandhus *Ex-Parte Paterna.*

The 16 bandhus in the line of the mother's maternal great-grandfather, *i.e.,* mother's mother's father's father.

(*N*) Matri Matri Bandhus *Ex-Parte Materna.*

The 16 bandhus in the line of the mother's mother's maternal grandfather.

M & N = 32.

Total of I, J, K, L, M & N = 96.

| | | | | |
|---|---|---|---|---|
| In Class | I. | (Atma Bandhus) | the total No. is | 48 |
| Do. | II. | (Pitri Bandhus) | do. | 86 |
| Do. | III. | (Matri Bandhus) | do. | 96 |
| | | | | 230 |

Thus we see that there are in all 230 male heritable bandhus in the 3 classes mentioned in the text of Vriddhasatatapa.

P. R. GANAPATI AIYAR.

## NOTES OF INDIAN CASES.

**Naraya Kaviraya *v.* Kandasami Goundan,** I.L.R., 22 M. 24.

We must confess to a feeling of surprise at the decision of *Shephard* and *Boddam,* J. J., in this case. It may be that a person suing for specific performance upon a contract to sell is entitled to ask for possession of the property, *vide* Form III, Sch. iv, Code of Civil Procedure. But this right to ask for possession is perfectly distinct from the right to possession which accrues from the conveyance. Upon a decree for specific performance the plaintiff obtains a conveyance and he bases a new action for possession upon the conveyance he has secured. S. 55 of the Transfer of Property Act deals with the right to possession which the purchaser of property has. We are equally unable to see the distinction attempted to be drawn between the case under notice and *Nathen Valad Pandu* v. *Budhu Valad Bhuka,* I. L. R., 18 B. 537. We should have thought no authority was needed for the position that a fresh suit based upon a conveyance would lie for possession. S. 43, Civil Procedure Code, has nothing to do with a cause of action that accrues subsequent to the institution of the prior suit.

**Queen-Empress v. Shree Ahobala Matam Jeer, I.L.R., 22 M. 47.**

We are not satisfied that the question involved in this case has been rightly decided. A criminal case partly tried is transferred from one court to another. S. 350, which empowers the succeeding Magistrate to continue the trial from where it was left off, does not apply to a case where the proceedings have been transferred to another court. And the proviso which entitles the accused to demand the commencement of the trial *de novo* is necessarily limited to cases with which the section itself deals, namely, of Magistrates succeeding in the same court. We imagine, however, that the new court to which the case is transferred must begin the proceedings *de novo* in the absence of a specific direction in the code. Can this rule be affected if the court to which the transfer is directed is presided over by the same officer who tried the case as judge of the court from which the case was transferred? *Collins*, C. J., and *Benson*, J., are of opinion that this circumstance makes all the difference. We do not find any provision in the Code saying so. We may also concede there is nothing unreasonable in such a provision being enacted. We quite agree that the cases cited by the counsel for the petitioner do not decide the question; nor does the passage in Prinsep's Commentaries at p. 293, quoting a case from the Allahabad weekly notes, 1889, p. 130, conclude the matter. But we think that in the absence of express statutory direction, it is not for the Judges to lay down a rule at variance with general principles; and in this case, we think, that the general rule that where a case is transferred from one court to another, the proceedings shall be begun *de novo* is not qualified by any statutory exception. In civil cases, a similar rule was laid down by the Allahabad High Court, *Bandhu Naik* v. *Lakhi Kuar*, I.L.R., 7 A. 342. S. 191 of the Code of Civil Procedure was, however, modified by the Legislature after the Allahabad ruling. Clause 2 of that section enables a Judge of the court to which a case is transferred to continue the proceedings from the stage at which they were left off, the proviso to the section enabling the court making the order of transfer direct a commencement of proceedings *de novo*. There is no provision in the Criminal Procedure Code similar to para. 2 of S. 191; and hence we conclude that the difference in this respect between the two enactments is intentional. The point is one of considerable importance, and we hope it will receive a full and dispassionate consideration when it happens to be raised again.

## SUMMARY OF RECENT CASES.

*Public Authorities Protection Act, 56 and 57 Vic., Ch. 6, S. 1—Suits in chancery—Judgment for defendant—Applications—Appeal.*

### Fielding *v.* Morley Corporation [1899,] I Ch. 1.

Section 1, Sub-section (*b*) of the Public Authorities Protection Act (56 and 57 Vic., c. 61) which provides with reference to an action against any person for any act, neglect or default in the execution or intended execution of any Act of Parliament or of any public duty or authority, that " wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client ", applies to " suits in chancery ", (injunction actions as well as actions for damages), but not to appeals or interlocutory applications.

The dismissal of an action in the Chancery Division is equivalent to a judgment for the defendant.

The plaintiff, a landowner, brought an action for an injunction to restrain the defendant corporation from allowing the water passing along an aqueduct or conduit to their reservoir—works constructed under a special Water Act, and also for an injunction to restrain the defendants from trespassing upon his lands, damages and costs. *Byrne*, J., dismissed the action with costs and held that the defendants were entitled to solicitor and client costs. The Court of Appeal dismissed an appeal from the whole judgment and held as to costs that the defendants (respondents) were entitled to costs as between solicitor and client in the Court below and simply to ordinary costs (as between party and party) in the Court of Appeal.

---

*Contract to sell equitable interest in reversion—Formal conveyance—Specific performance—Delay.*

### Levy *v.* Stogdon [1899], I. Ch. 5.

When the clauses of a contract to sell plainly contemplate a formal deed of assignment, relief can be obtained under the contract only on the ground of specific performance, although it relates to a purely equitable interest capable of passing without a formal conveyance.

And specific performance cannot be granted after 10 years from the date of the contract when the position of all the parties is altered, as the effect of so granting relief will be to do injustice to everybody concerned.

S. contracted to sell and K. to buy, free from incumbrances, a sum of £21,667-10-5 consols comprised in the vendor's marriage settlement

to which S. was entitled absolutely in reversion if there were no younger children of his marriage, but subject to the life interests of S. and his wife therein. The agreement provided amongst other things, that the purchase was to be completed within the 25th of June 1886. It appeared upon investigation that the reversion was subject, along with other property, to heavy incumbrances which S. could not discharge and from which the incumbrancers declined to release the reversion. S. became bankrupt in January 1888, and subsequently his property was sold in pursuance of a scheme of arrangement with his creditors under which sale R. claimed title to the reversion. S. and his wife died, respectively, in 1890 and 1895. No active steps were taken to enforce the contract of April 1886 until B., in whom K.'s interest under it became vested, obtained leave on March 5th, 1896, to attend proceedings in an action in which the estate of S. was being administered. In that action B. took out a summons claiming the consols, and an order was passed thereon directing an inquiry who was entitled to them with a provision that the applicant's claim was to be treated as if he had commenced an action for specific performance on March 5th, 1896. The master found that K. was not entitled, and *Stirling*, J., affirmed his decision. The Court of Appeal held on appeal from that decision that no property could be had in the consols except by a conveyance and that specific relief by way of execution of a conveyance could not be granted after such a long delay.

---

*Discovery—Accounts—Depositions—Privilege.*

## Goldstone *v.* Williams Deacon & Co., [1899], I. Ch. 47.

In an action by the infant children of G. against the defendant Bank with whom the widow of G. had (in alleged breach of trust in the administration of G.'s estate) deposited securities belonging to G.'s estate to secure advances to herself, the defendants obtained an order for discovery and claimed production—

(1) of the accounts prepared by the plaintiffs' solicitors in a previous action by the plaintiffs against the widow and her trustees in bankruptcy for breaches of trust in the administration of G.'s estate, produced to her on examination before an examiner and admitted by her to be correct, and entered as read in an order on a petition of compromise in that suit, and

(2) of the office copy of the widow's depositions,

both of which were in the plaintiffs' possession,

*Stirling*, J., in discharging the order for discovery of the accounts and ordering the production of the depositions, held:

(*a*) that the accounts prepared at the instance of the plaintiffs' professional advisers with a view to a former litigation after that litigation had been commenced were privileged and not open to the inspection of the defendants, even though they had not been prepared also with a view to the present litigation. *Walsham* v. *Stainton*, 2 H. & M. 1.

(Full and free communication ought to be allowed for the purposes of litigation, not only between a solicitor and his client, but between solicitor and persons whose assistance he requires or with whom he communicates in order to enable him properly to conduct the litigation);

(*b*) that a document once privileged is generally always privileged until the privilege is waived. *Bullock & Co.* v. *Carry & Co.*, 3 Q. B. D., 356; *Pearce* v. *Foster*, 15 Q. B. D., 114; *Calcraft* v. *Guest* (1898), 1 Q. B., 759, 761;

(*c*) that the mere fact that the accounts were entered as read in the order on the petition of compromise (the accounts having been merely exhibited to the depositions of the widow, not being themselves on the file nor having got on the examiner's notes and having been brought before the Judge only to enable him to determine whether the compromise was proper) did not constitute a public disclosure of the same so as to bring them under the rule laid down with regard to notes of proceedings in open court or before an arbitrator, in *Nicholl* v. *Jones*, 2 H. & M. 588; *In re Worswick*, 38 Ch. D. 370; *Rawstone* v. *Preston Corporation*, 30 Ch. D. 116; and that it did not amount to a waiver of the privilege. *North Australian Co.* v. *Goldsborough, Mort and Co.* (1893), 2 Ch. 381; and

(*d*) that the copies of the depositions constituting a note of what took place before an officer of the court, came within the rule as to notes of proceedings in open court or before an arbitrator, and that consequently they were *publici juris* and could not be said to be privileged.

---

*Condition—Gift—Condition in terrorem.*

## *In re* Nourse; Hampton *v.* Nourse, (1899) I. Ch. 63.

A condition annexed to a gift that the donee should get the property only on the condition of his marrying with the previous consent in writing of a certain specified person, is valid if the gift be one of realty.

But it is as such, void if the gift be one of pure personalty and the gift takes effect absolutely, whether the condition be precedent or subsequent. *Reynish* v. *Martin*, 3 Atk. 330.

There are however exceptions to this latter rule. Where there is a gift over of the property in case the condition is not fulfilled, then the condition is valid and ought to be performed. *Lloyd* v. *Branson*, 3 Mer. 117.

Where there is a gift in any event, the condition is not merely *in terrorem*, but valid and binding. *Gillet* v. *Wray*, 1 P. Wms., 284, applied; *Reynish* v. *Martin*, 3 Atk. 330, distinguished.

---

*Lease—Option to purchase—Assigns—Equitable assignee in possession.*

(5) **Friary Holroyd and Healey's Breweries, Limited, *v.* Singleton.** (1899) I Ch. 86.

In a covenant in a lease giving an option to purchase, the word "assigns" means the persons entitled to the term as between them and the lessor and to the benefit of the covenants entered into by the lessor and lessee, respectively, which run with the land demised.

The equitable assignee of a lease who has omitted to perfect his title by a legal assignment, although in possession of the premises and paying the rent reserved by the lease, not coming within the meaning of the word "assigns," is not entitled to the benefit of an option to purchase given to the lessee, his executors, administrators and assigns.

Thus where the plaintiff company claimed to be entitled to the benefit of an option to purchase given in a lease which they got under an agreement with an "old company" which went into voluntary liquidation, *Romer*, J., held that they were not entitled to the benefit of the option to purchase, though they were in possession of the premises, paying the rent reserved by the lease.

(6) **Wanton *v* Coppard,** (1899) I. Ch. 92.

The plaintiff negotiated with the defendant's agent for the purchase of a house to carry on his preparatory school for boys. The defendant's agent was aware of the purpose for which the house was required and informed the plaintiff, in answer to an inquiry on this point, that there were no restrictions preventing the house from being used for that purpose. The plaintiff asking to see a deed of covenant of 1851, subject to the provisions of which the house was to be sold, he was told that it

contained nothing that would interfere with the carrying on of a school. The plaintiff thereupon entered into a contract for the purchase of the house. The deed of covenant of 1851 after prohibiting certain offensive and noisy trades and businesses, provided that there should not be carried on "any trade or business or occupation whatsoever whereby any unwholesome or offensive or disagreeable smell or gas or unwholesome or offensive or disagreeable matter, deposit or fluid or any injurious or offensive or disagreeable noise or nuisance shall or may be collected, occasioned, caused or made." The plaintiff on coming to know of this, declined to complete his purchase and demanded the return of his deposit. This being refused he brought this action for rescission of the contract and for recovery of his deposit with interest. *Romer*, J., held (1) that the covenants could not be limited to trades or businesses *ejusdem generis* as those previously specially mentioned; (2) that they would interfere with the plaintiff carrying on his school in an ordinary and reasonable way; (3) that the representation of the defendant's agent looking at its substance was one of fact and not one of law; and (4) that the plaintiff was entitled to rescind the contract, though the representation was not fraudulent and might have been caused by the agent wrongly construing the deed or making a legal mistake. *Tod Heatly* v. *Benham*, 40 Ch. D. 80, followed.

## JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the receipt of the following publications:—

*An Abstract of Maine's Ancient Law*, published by Messrs. *Thomson & Co., Madras*;—Price Re 1.

The Lawyer and Magistrate, No. 3 (*in exchange*).
The Bombay Law Reporter for February (*in exchange*).
The Albany Law Journal for February (*in exchange*).
The Calcutta Weekly Notes for February (*in exchange*).
The Allahabad Weekly Notes for February (*in exchange*).
The Green Bag for February (*in exchange*).
The Canadian Law Times for February (*in exchange*).
The Canada Law Journal for February (*in exchange*).
The Educational Review for February (*in exchange*).
The Indian Journal of Education for February (*in exchange*).
The Harvard Law Review for February (*in exchange*).

***

*Overcrowding of the Bar*:—There is a growing feeling in some quarters that the annual addition to the number of vakils and pleaders is going on at a rapid rate and that the time is come when the Presidency and Mofussil bars have become overcrowded to an inconvenient extent. If this were a fact, there would be good ground for a consideration of the means of limiting the numbers. Overcrowding in the ranks of the profession leads to under-bidding in respect of fees and promotes an anxiety to get on at any risk. Professional character is likely to become lowered and the honorable traditions of the bar can no longer be kept up. The evil is especially great in a country where professional etiquette is not well regulated by an efficient professional opinion and where the bar is split up into several orders with varying qualifications. We think the time has not yet come when it can be said that there is such an inconvenient pressure. But it is well to look ahead and suggest means by which such a day may be pushed to a remote future. The bar is practically the only independent profession in this country which gives employment to any considerable numbers. That is the only field for ambition and talent apart from Government Service. To shut its portals against new comers or to make entrance extremely inconvenient is sure to be attended with great unpopularity. But it seems to us desirable to take some step to relieve the tension, if any. We do not think it necessary for the criminal courts to allow any longer uncertificated practitioners to appear before them. Again, it seems to us that it is time for the High Court to cease to hold the examination for second-grade pleaders, or, at all events, to suspend that examination for two or three years. This will reduce the annual addition to the ranks of pleaders and induce more first-grade pleaders to settle at Munsif's stations, thereby relieving to some extent the pressure in the bars of the District Towns. As another result of the same step, more High Court vakils than now will feel induced to settle in the District capitals. We think it undesirable to allow first-grade pleaders to enter upon practice the moment they pass their examination without subjecting them to a preliminary training. Such a training appears to us essential in their case as in the case of High Court vakils.

The mere passing of an examination is not the whole qualification for a professional career. Some acquaintance with the technicalities of pleading and procedure and with the code of professional ethics and propriety is a necessary equipment before a pleader is entrusted with the conduct of litigation. A six months' probation at the office of a vakil of standing may fairly be insisted on before a pleader is enrolled. Some effort should be made to form bar associations for the purpose of the

body exercising some sort of supervision over members who might otherwise be prone to err. It may be a further question whether the Legislature may not empower these bodies with some authority to enquire into allegations of misconduct and report upon them to the court. The changes and reforms we have above indicated will to a great extent improve the position of the bar and for a considerable time stave off the evil day if it ever should come, of inconvenient overcrowding of the profession, or, at all events, such a crowding as will have a deteriorating effect upon the tone and character of the profession.

***

*Tributes to the memory of Lord Herschell.*—In the House of Lords on Thursday the Marquis of Salisbury and the Earl of Kimberley having spoken, the Lord Chancellor said: Not only on my own behalf, but on behalf of the profession which, for the moment, I represent, I desire to associate myself with what has been said of our lamented friend Lord Herschell. No one can have been associated with him so long as I have been, and as some of your Lordships have been, in the study and administration of the law, without recognising in him a profound and most able lawyer—a man with a degree of energy and inexhaustible industry which made him master of any subject to which he applied himself. My personal relations with Lord Herschell go back many years before either of us was a member of this House. Although we have been opposed in Court, and although we have taken different views on public questions, I think I can say—indeed, I know it—nothing has ever occurred to mar the personal friendship that existed between us. Even the lay-members of your Lordships' House will be able to recognize the great loss which the judicial strength of the country has sustained, and I am quite sure that those who have known him in this country, or any other country, recognize the fact that this country is the poorer for the loss of a most able and upright Judge, the loss of one who was probably in the best sense of the word a law reformer and who devoted his best energies to putting right in the law whatever was wrong. I am sure it will also be recognized, not only in this country, but by all English-speaking races, that we have lost a jurist whose counsels were most valuable.

Lord James of Hereford.—I hope you will pardon me adding a few words. I speak under rather peculiar circumstances. I had opportunities of judging of Lord Herschell's great qualities which few men had. We served as law officers of the Crown together for some five years.

We served under circumstances of a peculiar character. Our labours were, severe, and I recollect with gratitude how generous was the conduct of Lord Herschell in bearing the greater share of those labours. During that period I learnt to know how great was the area of his knowledge, how strong and discerning were his perceptive faculties, and with what a true and just judgment he always determined every question that came before him. This house may thank him for his labours, but the public are sure to recognize how well he deserved thanks. In one of the last interviews I had with Lord Herschell he told me of the claim that had been made on his services by the Prime Minister to represent this country under circumstances of great delicacy. At the same time he told me of his system overwrought, and how weary and worn he was, how he was looking forward to a long period of rest and repose with those who were very near and dear to him; but he turned aside from that prospect of restoration to health, and cast not one lingering look upon it in order that he might do his duty to his country. Under these circumstances surely his friends will be proud of the recollection of the true friendship they enjoyed, and not only your Lordships, but the whole country ought to be grateful to him for the work he did.

***

The following were the words addressed to the law graduates of the Calcutta University by the Vice-Chancellor *Sir Francis Maclean.*

I am conscious that among those who have taken their degrees to-day a large number will follow the profession of the law. Among the graduates of this University a very large proportion are lawyers, and the members are not unlikely to increase. I fear, as lawyers, we are not over-popular. We are regarded as a sort of necessary evil, but our consolation must be that the world hitherto has not been able to get along without us; and it never will be able to get along without us. I agree that a permanent superfluity of lawyers in our social economy would be undesirable, but at the same time I can quite appreciate the motives and the attractions which prompt and draw the youth of so many countries to the pursuit of the law. To those of you who propose to follow that pursuit, I would give a very few words of special advice, which my now rather long experience may justify me in doing.

First let me impress upon all beginners the necessity of being absolutely honourable in every transaction, and do not, for the purpose of gaining some temporary and fleeting advantage to the conduct of any case, swerve by one hair's breadth from the path of honour. Recollect again that in

the conduct of a case, it is your client's and your client's interests alone which are to be considered; think of him, and only of him, and avoid the fostering of litigation. A great advocate is a great man; but the man who prostitutes his advocacy to promote his own mercenary ends is a creature only to be despised. There is, perhaps, among some of the native gentlemen who practise in the courts of this country a tendency to over refinement and subtlety in their argument. This over-subtlety and over technicality, if not a danger, is certainly a fault, a fault which I believe the reckless layman is ever inclined to attribute to every lawyer. Some of you may be astonished when I say that law and common sense proceed hand in hand much more than many of you may conceive. The greater my experience in the principles which govern judicial decisions, the more am I satisfied of their harmony with common sense. A very technical lawyer can never be a really great one, and I would advise you when you come to the actual practice of the law in the courts of this country to ascertain first the principle which ought to govern the decision of the particular case, to argue for that principle, to prefer, as the object point of your argument, a conclusion which satisfies rather the criterion of common sense and which is more in harmony with the practical side, the features of every-day life, than to aim for a result based upon over-subtlety and even unreasonableness. I am only tendering advice: I do not desire to be misunderstood: I am not saying that what I speak of as a fault is present to every native advocate: on the contrary, I am struck, most forcibly struck, with the marked ability and knowledge which characterises the arguments of many of the native gentlemen who practise in the courts of Calcutta, and to whose arguments the court is frequently much indebted. You may safely emulate them.

It has been said of the great Napoleon's soldiers that everyone of them might carry in his knapsack the baton of a Marshal of France, so, remember, that to each of you there is open at least the possibility of terminating your career upon the Bench of the High Court, one to my mind, of the greatest and most valuable prizes open to native gentlemen of this Empire, a most honourable ambition for an honourable career. May this be the goal of your ambition.

***

*Cross-examination acquittals*:—A correspondent writes to the Westminster Gazette relative to cross-examining on acquittals:—"Has the following anecdote any bearing on the subject? Sir Frank Lockwood was called in to cross-examine in a chancery suit. He was anxious to

impeach the veracity of an important witness on the opposing side, and when he came back to his common-law brethren he is reported to have said: 'What extraordinary ideas of cross-examination these chancery men have!' I asked Mr. A. if it were not a fact that he had been charged with a particular kind of fraud and been convicted, and he confessed that it was the truth; whereupon my opponent got up and said: 'Oh, that is all very well, but have you not been charged five other times with the same kind of fraud, Mr. A., and always been acquitted?' And, receiving an answer in the affirmative, sat down triumphant":—*The Albany Law Journal.*

***

*Admission of Lady Barristers*:—Though there is much discussion in Paris over the approaching admission of ladies to the bar, France, as a matter of fact, says the St. James's Gazette, is considerably behind hand in this latest form of enlightened feminine progress. Several other nations have anticipated her. New Zealand, Mexico, Chili, Finland, Japan, Sweden, Norway and Switzerland already enjoy the advantages of feminine advocacy. But the Swiss lady barristers are hardly treated. They have to prove their "good reputation," to pay a deposit of £120, to possess a certificate of proper capacity, and to obtain the permission of their husbands when they are married. And when the thing is carried in France this last condition will no doubt be found advisable. Yet even when a married barmaid (if that be the feminine of barrister) is restrained by her lord and master from appearing, she will make certain of at least one case by pleading for her liberty before the higher tribunals:—*The Albany Law Journal.*

***

A New Zealand newspaper contains the following: "A Maori chief, who lost £40 through a white storekeeper going through the Bankruptcy Court, has given the following lucid exposition of this particular branch of British jurisprudence: 'The pakeha (white man) who wants to become pakarapu (insolvent) goes into business, and gets lots of goods, and does not pay for them. He then gets all the money he can together, say £2,000, and puts all of it, except £5, away where no one can find it. With the £5 he goes to a judge of the court and tells him he wants to become pakarapu.' The judge then calls all the lawyers together, likewise all the men to whom the pakeha owes money, and he says: 'This man is pakarapu, but he wishes to give you all that he has got, and so he has asked me to divide this £5 amongst you all.' The judge there-

upon gives the lawyers £4, and the remaining £1 to the other men. Then the pakeha goes home" :—*The Albany Law Journal.*

***

*Contract assigning future earnings to ten years void*:—An interesting decision involving a contract made by a person whereby he assigned his earnings for ten years to another person as security for the payment of money borrowed, has just been handed down by Judge Hollister, of the Hamilton county (Ohio) common pleas court. It was in the case of John J. Rose for the use and benefit of D. H. Tolman, against the Hyndman Steel Roofing Co. Rose had been in the employment of a cab company, and borrowed money and pledged his salary from that company as security for the payment of the debt. The contract he made with Tolman provided that the company by which he was employed when he made the contract, or any other person with whom he might be employed in the ensuing ten years, should pay to Tolman on presentation of the order the amount of money due to Tolman less the amount already paid, which was indorsed upon the back of the order. Rose left the employment of the cab company and went to the Hyndman Steel Company, and the order for money was presented to the Hyndman Company and payment refused. Then the suit was filed. Judge Hollister held that such a contract was void, as against public policy, as a man could not make a contract pledging something he did not have. The contract pledged any salary the man might earn in a period of ten years. This could not be done:—*The Albany Law Journal.*

***

*Legal Laughs.*

In trial term, part XII, of the Supreme Court in Manhattan the other day, Justice Wilmot M. Smith presided. The clerk assigned to that part was G. C. Smith, the stenographer is H. J. Smith, and the court crier is Alexander B. Smith. What's the matter with the Smiths?

***

"I was recently making out a deed for a man," says a Detroit lawyer, "and all went swimmingly till I turned to him and asked his wife's name. 'Oh, yes, of course. Wife's name. Very necessary, to be sure,' and it was plain to be sure that he was sparring for a time, while making every effort to bring his memory into play. He had a rush of blood to the face, looked sorely troubled, and finally turned his back on me while he looked out of the window, as though relief were to be found there. 'Wouldn't that beat you,' he exclaimed, as he turned slowly back. 'I'll be blowed if I can recall her name. You see, they

used to call her 'Pet' when she was a girl at home, and that was her name with me up to two years after our marriage, when I began calling her 'Mamma.' I couldn't tell you her name if it were a capital offense not to know it. S'pose it wouldn't do to just call her 'Pet' in the deed?' It wouldn't, so he hurried away, and in an hour was back with his wife's full name on a slip of paper."—*Detroit Free Press.*

***

As a junior counsel, Mr. Justice Hawkins was once practising before Lord Campbell, who was somewhat pedantic. In addressing the jury Mr. Hawkins, in referring to a brougham, pronounced the word with two syllables—bro'am. "Excuse me," said his Lordship blandly, "but I think that if instead of saying 'brough-am' you were to say 'broom,' you would be more intelligible to the jury, and, moreover, you would save a syllable." "I am much obliged to your lordship," quietly replied Mr. Hawkins, and proceeded to bring his address to a close. Presently the judge, in summing up, made use of the word "omnibus." Instantly up rose Mr. Hawkins, and exclaimed: "Pardon me, m'lud, but I would take the liberty of suggesting that instead of saying 'omnibus' your lordship would say 'bus,' and you would then be more intelligible to the jury, and besides you would save two syllables."

A jocular barrister, going for his holidays, was told by a friend that two judges were laid up with swelling in the legs. "So I see," he said; "and others are suffering from swelling in the head." "Yes," was the reply, "both suffering from defective understandings."—*Law Times* (London).

Sir Walter Scott was a shrewd lawyer as well as an excellent novelist, and speaking through the mouth of his Counseller Pleydell in "Guy Mannering," he makes a very sagacious observation: "In civilized society," says the worthy counsellor, "law is the chimney through which all that smoke discharges itself that used to circulate through the whole house and put every one's eyes out; no wonder, then, that the vent itself should sometimes get a little sooty." No wonder, either, if lawyers should get a little cynical, witnesses as they are of a constant procession of human folly and roguery. Yet the fact is that they do not. Lawyers know that neither the angry litigant nor the hardened criminal is a fair sample of the race, and they do not, from these specimens, conclude with Tennyson's Northern Farmer that "men in the loomp is bäad." What they learn—and it is an excellent lesson—is tolerance, and this differs *toto cœlo* from cynicism. Carlyle's advice to people in general was, "Consume your own smoke." Alas! the sage

"recked not his own reed;" still the advice was none the less excellent. But by the time that advice is generally adopted the millennium will have arrived, and the smoky chimney of the law will no longer vex any of our souls.—*Law Journal* (London).

***

*Property in Animals Feræ Naturæ.*—When an animal *feræ naturæ* is reduced into possession, the possessor gains a qualified proprietary right. The limitations of that right were involved in a recent decision of the New York Supreme Court. *Mullett* v. *Bradley*, 53 N. Y. Supp. 781 (Sup. Ct. App. Term.). A sea-lion, brought from the Pacific coast to Long Island, escaped from the possession of its owner, and was abandoned by him. A year afterward it was recaptured upon the New Jersey coast by a fisherman, seventy miles from the place of escape. Upon these facts it seems clear that the former owner had forfeited his right by the abandonment. *Buster* v. *Newkirk*, 20 Johns. 73. However, this was not the *ratio decidendi.* The court held for the fisherman upon the ground that the owner had lost his property by the very loss of possession.

The ruling of the court represents the usual statement of the law of property in wild animals that remain undomesticated. *Goff* v. *Kilts*, 15 Wend. 550; *Ulery* v. *Jones*, 81 Ill. 403. The old writers assume that as ownership in animals *feræ naturæ* is acquired by taking possession, the property is always contingent upon the maintenance of an actual possession. The further ancient rules that such animals remain property when beyond manual control *animo revertendi*, and their young, always, *ratione impotentiæ*, seem not even exceptions to that general principle. Bracton, liv. 2, c. i.; Institutes, liv. iv. Tit. 9. Now, the usual title gained by possession is not defeasible by the mere loss of possession. Again, this ancient rule limiting the rights of ownership in animals *feræ naturæ* seems inconsistent with the related law governing the responsibility of owners for injury done by such animals. Where a bear slipped his collar and in his escape to the woods injured a man, the court held the owner liable as a matter of course. *Vredenburg* v. *Behan*, 33, La. Ann. 627. The one limitation that has been suggested is that when the animal reaches its native place or an environment specially adapted to its existence, liability should cease. This points to a practical distinction between indigenous and imported animals—liability for the one may cease upon loss of possession, not for the other.

It would seem that the same law should govern the extent of the responsibility for animals *feræ naturæ* and the rights of property in them;

and it is to be regretted that an express dictum in the principal case insists upon the ancient rule. If in the principal case the interruption of the owner's possession had been momentary, it would be hard to hold that a fisherman taking possession the next moment thereby had the title. Large amounts of capital are to-day invested in wild animals imported for exhibition, and grave injustice may some time arise from a strict application of the ancient rules:—*Harvard Law Review.*

***

*Donatio Mortis Causa.*—In the case of *Liebe* v. *Battman,* 54 Pac. Rep. 179, the Supreme Court of Oregon had occasion to apply to exceptional, as well as notorious facts the rule that a *donatio mortis causa* requires delivery. It appeared that one about to commit suicide indorsed a promissory note, sealed it in an envelope directed to a friend with whom he was living, and placed the envelope, together with a letter to the same friend, upon a table beside his bed. Then he shot himself. The friend came quickly from his room in an opposite part of the house, but the dying man, without further reference to the gift, soon passed into a comatose state from which he never rallied. It was held there had been no delivery in spite of the fact that the friend had picked up the envelope before the donor died, though after he became unconscious. The Court said, "There must be a parting with the dominion over the subject-matter of the gift with a present design that the title shall pass out of the donor and to the donee." The definition and the application of it seemed sound. Placing the addressed envelope on the table where it was directly at the hand of the donor could not amount to a giving up of dominion, and though possibly there was a change of possession before the death that was not enough. A transfer, a positive act of giving, a parting with dominion,—these require a corresponding intent which the unconscious man could not have had. *Leonard* v. *Administrators of Kebler,* 50, Ohio St. 444.

The facts suggest another case far more difficult,—where the document is mailed by the man about to die, but he becomes unconscious before it is actually received. There, with full intent, he has actually set in motion the machinery which was to complete the gift, has done all in his power, and has put the document beyond recall, actually outside of his own dominion. The technical requisite, possession in the donee, alone is lacking. The cases of gifts *inter vivos* where a delivery to A for B is held a good delivery to B are clearly in point, but it must be remembered that these decisions are not harmonious and that the courts might be loath to apply the relaxation of the law *inter vivos* to the *donatio.*

The caution that led the Roman law to require five witnesses to perfect a gift in fear of death still lingers in our law and causes not only suspicion and strict scrutiny, but, occasionally at least, a tendency to cramp the rights of the donee :—*Harvard Law Review.*

***

*Quasi Contracts—Mistake of Law.*—Plaintiff, as executor, paid a legacy to an adopted child, erroneously believing her to be entitled to it by law. On discovering his mistake, plaintiff sued the child's guardian for the money. *Held,* that he cannot recover. *Phillips* v. *McConica,* 51 N. E. Rep. 445 (Ohio).

While money paid under a mistake of fact can generally be recovered, this case holds that there can be no such recovery when the mistake is one of law. The reason given for this distinction, namely, that ignorance of the law excuses no one, seems unsatisfactory, for the plaintiff does not ask to be excused for having injured any one, but merely that the defendant shall not be allowed to make an unjust gain out of the plaintiff's mistake. Where the mistake is one of fact, recovery is allowed because it is manifestly inequitable for the defendant to keep the money. This reason evidently applies just as strongly when the mistake is one of law, and there are a few cases supporting this view. *Mansfield* v. *Lynch,* 59 Conn. 320; *Culbreath* v. *Culbreath,* 7 Ga. 64. The great weight of authority, however, supports the principal case. *People* v. *Foster,* 133 Ill. 496; *Vanderbeck* v. *Rochester,* 122 N. Y. 285; *Carson* v. *Cochran* 52 Minn. 67 :—*Harvard Law Review.*

***

*Torts—Malicious Prosecution of Civil Suit.*—*Held,* that an action for the malicious prosecution of a civil suit will not lie where there has been neither arrest of person, nor seizure of property, nor other special injury. *Smith* v. *Michigan Buggy Co.,* 51 N. W. Rep. 569 (Ill.).

The question was squarely before the Illinois court for the first time, and after a full examination of the authorities a decision was reached which is probably contrary to the weight of American judicial opinion. *Closson* v. *Staples,* 42 Vt. 207; *McCardle* v. *McGinley,* 86 Ind. 538. The authority in accord with the principal case, however, is strong. *Wetmore* v. *Mellinger,* 64 Iowa, 741; *Muldoon* v. *Rickey,* 103 Pa. 110. The latter decisions must be put on the broad ground of public policy, and on that ground, it seems, ought to be supported. Allowing the action tends to increase useless and vexatious litigation, and one who honestly seeks redress through legal means should not be subjected to the probability

of incurring another suit as a penalty for failure in his own. The successful defendant in a civil suit maliciously prosecuted suffers slight damage beyond the expense of the suit. He is reimbursed for this by way of costs, and if, as in most American jurisdictions, these do not cover his entire expense, that is a proper case for legislative action.—*Harvard Law Review.*

***

*The Pleadership Examination.*—We have often found the question papers set for the Pleadership Examination to be much more difficult than those set for the B. L. Examination in the same subjects; and this difference partly accounts for the much heavier slaughter in the former Examination. The paper on Civil Procedure and Limitation for the Pleadership Examination of 1899 appears to be one of the worst instances that have come across our notice. The questions require an intimate knowledge, not merely of the sections and articles, but also of the case-law upon the subjects. In not a few instances the decisions of the courts are contradictory and uncertain. We doubt very much whether even among practising lawyers the great majority would not find it difficult in passing in this paper. It seems to us that the Examination Board must have been very lax in the exercise of its powers of moderation, for, otherwise, we cannot understand how a paper of such scandalous severity happened to be passed by the Board.

---

# REVIEWS.

*Index of Cases reported in the Indian Law Reports: Allahabad Series,* by Dharam Das Suri, published at *The Caxton Press, Lahore.*

Mr. Dharam Das Suri has done a piece of useful service in bringing out this book. If the practising lawyer wishes to know how a case reported in the Allahabad Series has been dealt with by that or any other court, he need only turn to this index for the purpose. As the index is only confined to Allahabad cases, indexes of the reports of the other High Courts not being available the usefulness of the publication is considerably limited. We hope Mr. Suri will complete his labors by bringing out indexes of the

reports of the other High Courts. Mr. Pearson's and Mr. Ghose's indexes are based upon the alphabetical order of the names. Mr. Suri's is based upon the order of the cases as reported.

---

*The Indian Stamp Act*—No. II of 1899. Compiled by D. E. Cranenburgh and published at the *Law Publishing Press, Calcutta.* Price Rs. 1.

We congratulate Mr. Cranenburgh on his enterprise in bringing out his Indian Stamp Act of 1889, together with the proceedings of the Legislature and all the rulings under the Stamp Law. The publication is very timely, and we think it will be found very useful by all practising lawyers, more especially with the copious general index. He has carefully pointed out by printing in italics the changes made by the Legislature upon the old law. The printing and the paper leave nothing to be desired.

---

*Presumptions and Inferences.*—A note based chiefly on Privy Council judgments on the law as to second appeals in India by G. C. Whitworth, I. C. S., Printed at *The Mercantile Oil Engine Press, Karachi.*

Mr. G. C. Whitworth has made a useful contribution to the right understanding of S. 584 of the Code of Civil Procedure.

---

*The Yearly Practice of the Supreme Court* for 1899 :—By Muir Mackenzie, Lushington and Fox, 1 vol., published by *Butterworth & Co., 7, Fleet Street, London.* Price, 20*s.* net.—We have the pleasure to introduce this edition of the Supreme Court Practice to the legal profession as a very handy and convenient one for reference. As the book consists of a single volume, it spares the practitioner the trouble and annoyance attending a reference to a two-volume book. One inconvenient feature of many annotated books including the Annual Practice is that the rules of the Supreme Court are not printed continuously, but are cut up by numerous and often long paragraphs of notes which prove very irritating when a practitioner wants to refer to the several rules consecutively. This has been happily avoided in

the present book, and we find all the rules of the Supreme Court printed continuously at the top of the page, and the notes printed at foot. While the limit of space imposed by the necessity of confining the book to a single volume prevents the notes from being as full as in the Annual Practice and thus competing with and displacing the latter, it gives as much information as it is possible to give within the compass of a single volume. We think the book will be a useful addition to the practitioner's shelf.

The Madras Law Journal.

PART III.] MARCH 1899. [VOL. IX.

## THE SUCCESSION OF GOTRAJAS UNDER THE MITAKSHARA.

The term '*gotrajas*' literally means 'persons born in the same *gotra*.' It would therefore include not only the *sapindas* and the *samanodakas* as defined in treatises on Hindu Law, but also persons beyond the limits of the *sapinda* and the *samanodaka* relationships but claiming descent from a common ancestor, whatever be the distance in degrees from him. In ancient Hindu law-books, however, the term '*gotrajas*' has not been always used in its literal sense, or in the same sense throughout. This circumstance causes some amount of confusion and difficulty in determining the conditions under which *bandhus* can claim to succeed to the wealth of a sonless deceased Hindu. Under the Mitakshara, *bandhus* come in in default of *gotrajas*, and it is therefore necessary to determine the limits of the class of *gotrajas*. The *gotrajas* are divided into two classes for purposes of succession, *i.e.*, the *sapindas* and the *samanodakas*. There is no dispute about the limits of *sapinda* relationship, but the limits of *samanodaka* relationship are not quite so easy to ascertain, nor is it quite clear whether persons of the same *gotra* beyond the limits of *samanodaka* relationship exclude the *bandhus* or not. We propose to discuss these questions in this article and we proceed to examine what the ancient Hindu law-books have to say on the subject of the limits of *samanodaka* relationship.

Manu says: "The *sapinda* relationship ceases with the seventh degree; but the *samanodaka* relationship (ceases) when birth and name are no longer known." (Manu, V. 60.) Again, the same author, in speaking of the order of succession to the wealth of a deceased sonless Hindu, says: "To the nearest *sapinda*, the wealth belongs; in default of *sapindas*, the *sakulya* is heir or the preceptor

or the disciple." (Manu, IX. 187.) Kullukabhatta in the course of his commentary on this verse interprets '*sakulya*' to mean '*samanodaka*.' Vijnanesvara after indicating the order of succession among *sapindas*, the former of the two classes into which he divides the *gotrajas* (gentiles), says of the latter class, *i.e.*, the *samanodakas*: "If there be no *sapindas* the *samanodakas* take the wealth. These should be understood to reach to seven degrees beyond the *sapindas*, or as far as the limits of the knowledge of birth and name extend. Accordingly Brihat Manu says: 'The *sapinda* relationship ceases with the seventh degree; but that of *samanodakas* extends to the fourteenth, or as some affirm, reaches as far as the memory of birth and name extends. Beyond that is said to be the *gotra*.'" (Stokes' Hindu Law Books. Mit. Chap. II, Sec. V, pl. 6.) The author of the Viramitrodaya says: "The *gotrajas* are the paternal grandmother, the *sapindas* and the *samanodakas* * * *. In default of *sapindas*, the *samanodakas* take the wealth. These extend to seven degrees beyond the *sapindas*, or as far as the knowledge of birth and name extends. Accordingly Manu says: 'The *sapinda* relationship ceases with the seventh degree, but the *samanodaka* relationship extends to the fourteenth, or as far as the recollection of birth and name extends; beyond that is said to be the *gotra*.' We have already proved that by the terms '*bandhu*' and '*sakulya*' used in the text of Vishnu, *sapindas* and *sagotras*, *i.e.*, men of the same *gotra*, are respectively intended. The *samanodakas* also take the wealth in the order of propinquity." (Golap Chundra Sarkar Sastri's Viramitrodaya, Chap. III, Part VII, pl. 1 and 4.) The Sarasvati Vilasa says: "If none of these is alive, the *samanodakas* take the property. These also are to be understood to be the seven above the *sapindas*, or those who extend as far as the knowledge of birth and name. As Manu says: '*Sapindaship* ceases with the seventh male, and *samanodakaship* ceases with the fourteenth; some say with the remembrance of birth and name. Beyond that is called *gotra*'." (Foulkes's Sarasvati Vilasa, paras. 590 and 591.) The Vyavahara Mayukha says: "All the *sapindas* and the *samanodakas* follow, in the order of propinquity, as enumerated by Manu: 'Now the relation of the *sapindas* [or men connected by the funeral cake] ceases with the seventh person [or in the sixth degree of ascent or descent], and that of *samanodakas*, or those connected by an equal oblation of water, ends only when their birth and family-names

are no longer known." (Stokes' Hindu Law Books. Vya. Mayu, Chap. IV, Sec. VIII, p. 21.) The Vyavahara Madhaviyam says: "In default of *sapindas,* the *samanodakas* take the wealth; the *samanodakas* are those within seven degrees beyond the *sapindas,* or extend so far as knowledge of birth and name extends. That has been stated by Brihat Manu in the text:—'*Sapinda* relationship ceases with the seventh degree, but *samanodaka* relationship ceases with the fourteenth, or as some affirm when birth and name are no longer known." It is not necessary to multiply similar quotations from other ancient Hindu law-books. It may be said that there are two definitions given of *samanodaka* relationship, one limiting it to seven degrees beyond the limits of *sapinda* relationship, *i.e.,* to the fourteenth degree and the other indefinitely extending it to the distance where knowledge of birth and name ceases. It will be seen from the passage of the Mitakshara already quoted that Vijnanesvara does not decide between the two definitions, nor does he even by implication suggest that the more comprehensive definition is not acceptable. He apparently seems to incline equally to either view, for the expression 'or as far as the knowledge of birth and name extends' is Vijnanesvara's own; and he quotes Brihat Manu in support of both the definitions of *samanodaka* relationship.

We shall next proceed to see what modern text-writers on Hindu Law have to say on the limits of *samanodaka* relationship. Mr. Mayne after speaking of the order of succession among *sapindas* says: "The above order, as will be seen, exhausts all the *gotraja sapindas* of the nearer class. Then follow the *sakulyas* or persons connected by divided oblations and the *samanodakas* or kindred connected by libations of water. The former extend to three degrees both in ascent and descent beyond the *sapindas* and the latter to seven degrees beyond the *sakulyas,* or even further so long as the pedigree can be traced." (Mayne's Hindu Law, 5th Edn., Sec. 530.) In support of this view he relies on the passages from the Mitakshara and the Vyavahara Mayukha already quoted. Messrs. West and Buhler say: "Regarding the *samanodakas,* who occupy the next division, it may suffice to remark that according to the principles of interpretation adopted by Vijnanesvara in regard to the passage on *sapinda* relationship, they must be understood to comprise the male

ascendants, descendants and collaterals, beyond the sixth and within the thirteenth degrees, together with their wives or widows, or all those persons who can furnish a satisfactory proof of their descent from a common ancestor. The order of their succession also must be regulated by the same principles as that of the *sapindas*. On failure of *gotraja sapindas*, the *gotraja samanodakas* inherit the estate of a separate householder. *Gotraja samanodakas* are all the male descendants, ascendants and collaterals, within 13 degrees, together with their respective wives; or according to some, all persons descended from a common male ancestor, and bearing the same family-name. The *samanodakas* inherit, like the *sapindas*, according to the nearness of their line to the deceased." (West and Buhler's Hindu Law, 3rd Edn., pp. 132 and 133.) Bhattacharya says that on failure of *sagotrasapindas*, the inheritance goes to the *samanodakas, i.e.*, agnates beyond the seventh degree known to be descended from a common male ancestor in unbroken lines of male descent and quotes the text of Brihat Manu in support of his view. He adds: "*Samanodakas* are not expressly mentioned in the text of Yájnavalkya. But they are included in the term '*gotraja*' in the text. Jimutavahana takes the word '*gotraja*' to denote only *gotraja sapindas*. But according to the plain meaning of the word, it denotes *sapindas* as well as *samanodakas*. Vijnanesvara takes the word to mean *sagotras*. He is therefore obliged to put the *samanodakas* before *bandhus* who are, according to him, *sapindas* connected by blood through females." (Bhattacharya's Hindu Law, p. 296.) In speaking of the succession of *bandhus*, the same author says: "Cognate *sapindas* or *bandhus* succeed after *gotrajas* according to Yajnavalkya's text. *Gotrajas*, according to Vijnanesvara, include all agnates descended from a known common ancestor. The result is, that the cognates cannot succeed so long as there is a single agnate. (*Ibid.*, p. 298.) Rajkumar Sarvadhikari in explaining the meaning of the word '*gotraja*' used in the text of Yájnavalkya above cited says: "A person is a *gotraja* of the deceased, if it can be established that he and the deceased are descended from a common ancestor. Two persons then are *gotrajas*, if their name and lineage could be traced to a common male ancestor. Seven generations are related to each other as *sapindas*. All the other generations 'if the memory of their birth and name is preserved' are related to each other as

*samanodakas.*" (Sarvadhikari's Hindu Law, p. 592.) Again, speaking of the right of succession of *samanodakas*, the same author says: "All persons who bear the same family-name, and can prove that they are lineally descended from a common ancestor, how high soever he may be in the genealogical tree, may claim the relation of *samanodaka*, and are entitled as such to inheritance. Two conditions are necessary to constitute a *samanodaka*. He must be of the same *gotra* as the deceased, and he must trace his descent from a common ancestor. As soon as a person can show that he bears the same family-name, and is a descendant of the same common progenitor, he ranks as an heir, and takes the estate of the deceased on failure of *gotraja sapindas.*" (*Ibid*, p. 686.)

The case-law on the subject is extremely meagre. The only reported case dealing with the questions of the limits of *samanodaka* relationship is to be found at p. 372, I. L. R., 10 Bom. In that case, *Bai Devkore* v. *Amritram Jamiatram* and others, the plaintiff calling herself a *bandhu* of the deceased claimed to recover certain property as against the defendants who were distant cousins of the deceased, being related to him beyond thirteen degrees. It was contended for the defendants that the plaintiff on her own showing was not among the *bandhus* of the deceased, and that even if she were, she was excluded by them, they being related to the deceased as *samanodakas*. Their Lordships of the Bombay High Court without going into the question whether the plaintiff was a *bandhu* of the deceased or not, came to the conclusion, on a consideration of the authorities bearing on the subject, that the more extended meaning of the word '*samanodakas*' contended for by the defendant was acceptable, and that the defendants being therefore related as *samanodakas* to the deceased excluded the plaintiff even if she were a *bandhu* as alleged by her. In a subsequent case which came up before their Lordships of the Madras High Court, the same question arose for consideration. The contest in the case was between a *bhinnagotra sapinda* (bandhu), admitted to be such, of the deceased and a person who called himself a *samanodaka* of the deceased. On the facts, the Courts agreed in finding that the latter was removed from the deceased by more than fourteen degrees; their Lordships however held, following the reasoning and the decision of the Bombay High Court in the case

just above cited, that on the findings of facts the person was a *samanodaka* of the deceased under the Mitakshara and that he excluded the *bandhu* from the succession. This judgment of the Madras High Court is unreported, and as an authority, it may be taken for what it is worth. Thus the case-law on the subject, meagre as it is, is clearly in favor of the more comprehensive acceptation of the term '*samanodaka*' as denoting the second of the two classes into which *gotrajas* are divided by Vijnanesvara for purposes of succession.

Nor can it be urged that this conclusion in favor of giving the wider meaning to the term '*samanodaka*' is repugnant to the genius of the Hindu Law, or the accepted principles regulating the order of succession to the estate of a sonless deceased Hindu under the Mitakshara law. Connection with the deceased through an unbroken line of males gives admittedly a better right to the estate of the deceased than a claimant's relationship to the deceased in which a female intervenes. Of course, it would be urged that if this were a correct view of the law, the *bandhus* related as *sapindas* to the deceased would be postponed in the matter of succession to agnates of the deceased, though removed by more than fourteen degrees from him. True; but this legitimate result of accepting the wider definition of *samanodaka* relationship cannot possibly militate against one's sense of propriety. If a claimant removed by thirteen degrees from the propositus and connected with him through an unbroken line of males is allowed to succeed to his estate in preference to so near a *bandhu* of the propositus as his sister's son, it is difficult to understand how one fourteen or fifteen degrees removed loses this preference. It would, of course, be urged that, if this argument were sound, *bandhus*, however closely related to the propositus, could not come in so long as any *gotraja* of the deceased is alive, and that this result could not have been contemplated by the author of the Mitakshara who makes so much of propinquity as a ground of succession. Our answer is that, studying closely what Vijnanesvara has said on the subject of the succession of *gotrajas*, one would be led to think that, according to Vijnanesvara's view, the *bhinnagotra sapindas* or *bandhus* of the deceased should come in after all the agnates, *i.e.*, men of the same *gotra* with the deceased are

exhausted. Vijnanesvara says that by the term '*gotrajas*' are meant the paternal grandmother, the *sapindas* and the *samanodakas*. He then indicates the order of succession among the *sapindas* and proceeds to define the *samanodakas* as agnates of the deceased extending to the fourteenth degree, or as far as knowledge of birth and name extends. Then proceeding to lay down the succession of *bandhus*, he says that they come in after the *gotrajas* or gentiles. Having already stated that the *samanodakas* succeed in default of *sapindas*, one would naturally expect the author of the Mitakshara to say that the *bandhus* succeed in default of *samanodakas* and not in default of *gotrajas*, if *gotrajas*, *i.e.*, men of the same *gotra* remoter than the *samanodakas* had no title, in his opinion, to succeed in preference to *bandhus*.

Again, it is clear that *sapindas*, *i.e.*, *sapindas* of the same *gotra*, succeed first in preference to the *samanodakas* and the *bandhus*, because of their being of the same *gotra* and of their *sapinda* relationship. Now, the question naturally arises whether the being of the same *gotra* and the *sapinda* relationship should co-exist in the same claimant to give him a right of succession, or if each in itself is sufficient to confer the right, which of them gives the preferable right? The fact that the *samanodakas* and the *bandhus* are each mentioned among the classes of heirs shows that each of these two grounds of the right of succession is sufficient in itself to confer the right. Then the only question is which of them confers the preferable right. If *sapinda* relationship could do that, the *bandhus*, *i.e.*, the *bhinnagotra sapindas* according to Vijnanesvara, should succeed before the *samanodakas*. But they do so, according to Vijnanesvara, only after the *samanodakas*. Thus it is clear that according to Vijnanesvara, the being of the same *gotra* is to be preferred to *sapinda* relationship as a ground of the right to succeed. On this view, men of the same *gotra* with the deceased should succeed before his *bandhus*.

It may be objected that the clause in the passage of the Mitakshara above quoted, *i.e.*, "the *gotrajas* are the paternal grandmother, the *sapindas* and the *samanodakas*", is a complete definition of the term '*gotrajas*' and that men of the same *gotra* not coming within the definition of *samanodakas* are not heirs under the Mitakshara. In reply we urge that the clause cannot possibly have been

intended to serve as a definition of *gotrajas* for the following reasons: first, the specific mention of the paternal grandmother who does not represent a class indicates that no definition of the word '*gotraja*' was intended; secondly, the clause is evidently intended to indicate the order of succession among *gotrajas*, as is shown by the special mention of the paternal grandmother as the first among the heirs coming under this class. It may well be argued that Vijnanesvara's intention in saying that *gotrajas* are the paternal grandmother, the *sapindas* and the *samanodakas*, was simply to mention particular classes of *gotrajas* of whom he had something special to say. The classes of *sapindas* and *samanodakas* are subject to limitations other than those inferrible from the use of the term 'gotrajas' and Vijnanesvara may have specially mentioned these two classes of *gotrajas* for the purpose of defining them and their rights of succession. Men of the same *gotra* remoter than the *samanodakas* are not capable of being further defined than as men of the same *gotra* and their rights of succession being governed by the general principle of propinquity, Vijnanesvara had nothing special to say about them. Again, if the clause is to be construed as a definition of the term 'gotrajas,' it must be conceded that in construing the term '*gotrajas*' as he has done, Vijnanesvara has narrowed its literal acceptation. We can, of course, well understand that he would have done so, if that course was necessary to make the import of the term '*gotrajas*' consistent with the main principle of his law of Inheritance. But the literal and more comprehensive meaning of the term '*gotraja*' is perfectly consistent with the principle which admittedly postpones the *bandhus* to the *samanodakas*. It is therefore rather unreasonable to believe that Vijnanesvara understood the term '*gotrajas*' in any other than its literal sense. It may also be argued that under the wider definition of the term '*samanodakas*' which Vijnanesvara apparently accepts as well as the narrower one, men of the same *gotra* can claim to be ranked among the *samanodakas* and that there was no necessity for their special mention.

Again, men of the same caste, men who are not related to the deceased, such as the pupil and the fellow-student, are named among the heirs to a deceased sonless Hindu. Is it then probable that men of the same *gotra* were under no circumstances intended

to be heirs? Surely men of the same *gotra* must be preferred to men of the same caste, and when the latter are mentioned among the heirs in the ancient Hindu Law books, the former must be. If this view be correct, under what term in Yajnavalkya's text "the wife, the daughters, etc.," could men of the same *gotra* be included, except under the term '*gotrajas*?'

There are also texts which lay down the succession of men of the same gotra as such. Gautama says: "*Sapindas, sagotras, i.e.,* those connected by descent from the same Rishi (*Vaidika gotra*), and the wife shall share the estate of the person deceased without issue." (Gautama, Ch. XXVIII. 21.) Vishnu says: "On failure of the brother's son, the wealth goes to the relations called *bandhu*; on failure of them, to the relations called *sakulya*" (Vishnu, XVII. 10 & 11.) The author of the Vivadaratnakara interprets the term 'bandhus' to mean *sapindas* and the term 'sakulyas' to mean men of the same *gotra*. (Vivadaratanakara on Inheritance, Chap. XXXIV.) The author of the Viramitrodaya also understands the words 'bandhu' and 'sakulya' in the text of Vishnu to mean 'sapindas' and 'men of the same *gotra*' (Viramitrodaya, Chap. III., Part VII., Section 4.) Narada says: "On failure of daughters, the *sakulyas*, and the *bandhavas*; next a *sajati*; in default of all, it goes to the king." (Narada, XIII. 51.) The commentators explain the term '*sajati*' to mean a descendant from the same Rishi. (II. Cole. Dig., Part V. 8, 448.)

It seems to be therefore fairly clear from an examination of the ancient authorities on the subject that men of the same *gotra* are as such among the heirs of a sonless deceased Hindu. It may be urged that among the different subsections of the Brahmin caste men of the same *gotra* can be found and that it would be absurd if one member of one subsection of the caste could succeed to the property of one belonging to a different subsection of the same caste. But it should be remembered that these subsections are of comparatively modern origin and that the sacred Codes of law were written long before these subsections came to be recognised. In some of the Hindu law-books, however, there are to be found some limitations to the class of men of the same *gotra* entitled to succeed as such. For instance, a passage from the commentary on the Dayabhaga of Jimutavahana extracted at foot of page 205 of the

Bombay Edition of Yajnavalkya's text with the Mitakshara says: "In default of him, *sagotras*; *i.e.*, men of the same *gotra* and men of the same *pravara* living in the same village with the deceased respectively take the wealth." The author of the Dayakrama Sangraha also says: "In his default persons bearing the same family-name being inhabitants of the same village succeed. On failure of them, persons, inhabitants of the same village and descended from the same patriarch are the successors according to the text of Gautama." (Stokes' Hindu Law Books, page 484, paras. 30 & 31). These limitations sufficiently narrow the circle of men of the same *gotra* who may lay claim to the estate of a sonless deceased Hindu.

Though this is the view of the law suggested by an examination of the ancient Hindu Law texts bearing on the subject, we are yet to hear of a person of the same *gotra* as such claiming a right to the estate of a sonless deceased Hindu in preference to a *bandhu*. There have been very many cases in which distant *bandhus* of the deceased have claimed the estate of a sonless deceased Hindu, but in none of these cases has a person on the ground of his being of the same *gotra* with the deceased objected to the title of the *bandhus* to succeed, nor has any of the defendants in such suits sought to put the plaintiff out of Court on proof of the allegation that there was in existence, as there must always have been, a nearer heir to the deceased in the person of some one of the same *gotra*. The fact that no such contention has ever been raised in Courts of law, notwithstanding the large number of cases in which it could have been raised is almost conclusive proof that the contention was not considered to be supportable; or it may as well be that the term '*sagotra*' found in some of the texts of ancient Hindu Law books bearing on the subject of succession has not been understood by the public to denote all men who claim to belong to the same *gotra* on the strength of mere tradition and usage but to denote only such of them as could clearly trace their birth to the same ancestor. To lay down the succession in preference to *bandhus* of men of the same *gotra* (traditional descent from the same Rishi) would be postponing the succession of *bandhus* indefinitely to persons who on the well-recognised principle of propinquity can have no manner of claim to the estate of the deceased. Whatever therefore be the law on the subject as gatherable

from ancient Hindu Law treatises, it must at this day be admitted either that custom has virtually over-ridden the ancient law on the right of men of the same *vaidikagotra* as such to succeed to the estate of the deceased, or that the meaning of the term *sagotra* has by common consent been narrowed to denote only those persons that can clearly trace their pedigrees to the same common ancestor.

S.

---

## TRANSLATED FROM THE MADANA PARIJATA.

*The order of succession to the property of a deceased divided parcener leaving neither son nor grandson.*

On this subject, Yajnavalkya says: "The wife, the daughters likewise, both parents, brothers, likewise their sons, the gotrajas, bandhus, the disciple and the fellow-student; of these, on failure of the preceding, the next in order is the heir to the estate of one who has departed for heaven, leaving no issue; this rule extends to all classes."[1] Wife] one who had been duly married. The singular is with regard to the caste. Therefore if they are equal or unequal in caste, they shall divide the wealth and take their proper shares according to the rule laid down in 'four, three, two and one shares.'

In default of the wife, the daughters take. So also Kâtyâyana: "The wife takes the wealth of the husband if she remains chaste; in her default, the daughter if she is unmarried."[2] By the distinction laid down in 'if she is unmarried' it is understood that in case both married and unmarried daughters exist, the unmarried only take; in default of the unmarried, the married take. Even among the married, the poor alone first take; and in their default only, the rich; as the reasoning employed in the rule laid down by Gautama: 'stridhana goes to the daughters unmarried and unprovided for' applies equally to the paternal wealth.

In default of the daughter, the daughter's son even is the heir; as laid down by Vishnu: "If there exist neither sons nor grandsons of a person, the daughter's sons shall take the wealth; for the male offspring of a son and of a daughter are considered equally qualified to perform the obsequies for the person."[3] This meaning is also inferred from the use of the particle 'also' made use of by Yâjnavalkya in the text, 'the daughters also.'

---

1. Yajnavalkya, II. 135. 2. Not found. 3. Not found.

In the absence of the daughter's son, the parents are the heirs. Parents, *i.e.*, mother and father. The order of mention in the expansion of the compound must also be understood to apply to the taking of wealth. Hence the mother takes first; and in her default the father. This order in the whole sentence 'the wife, the daughters, etc.' is stated in the latter portion of the passage, 'in default of the preceding, the succeeding is the heir'; and that all that is correct is laid down by us in the 'inheritance' chapter of the Subodhini, a commentary on the Mitakshara; and it is not here written for fear of redundancy.

In default of the father, the brothers (take); here also it is to be understood that the uterine brothers take first, because of their nearness of relation owing to their being born of the same mother, and that in the absence of uterine brothers, the half-brothers succeed; heirship should be understood to arise according to the nearness of relation. 'To the nearest sapinda, the inheritance next belongs'; the meaning is that he among the sapindas who is the nearest related by particles of body shall take the wealth (of the deceased). In default of brothers of both the classes, their sons, *i.e.*, brothers' sons take; even here, the sons of uterine brothers take first; in the absence of these, the sons of half-brothers. If, however, a brother dies and his wealth goes to the brothers according to the rule laid down in "the wife, the daughters also," and if before the partition of that takes place one of the brothers dies leaving sons, then the sons shall certainly get their father's share, according to the rule 'among sons of different fathers, the allotment of shares is according to the fathers'. 'The gotrajas'; by this term is meant the paternal grandmother, the paternal grandfather, his sons, and their sons, and in their default the paternal great-grandmother and rest; and in default of them also, the samanodakas take (the property). Here this is the order. In default of brothers' sons, the grandmother takes the wealth; in her default, the paternal grandfather; for just as the father has a right to the property only after the mother, so also the succession of the paternal grandfather is only after the grandmother. In default of the paternal grandfather paternal uncles succeed, in the same way as brothers in default of the father. Even here the relative position of brothers of full and of half blood is the same: the sons of the paternal grandmother take the inheritance first and in their default the sons of

the co-wives of the paternal grandmother. In default of even these, the sons of paternal uncles succeed in the same way as the brother's sons (when brothers of both kinds are extinct). In their default, the paternal great-grandmother; in her default, the paternal great-grandfather; in his default, the sons of the paternal great-grandfather. Thus the order of heirs up to the seventh degree should be known by the rule 'in the absence of the brother, his sons succeed.' In default of sapindas to the seventh degree the samanodakas succeed; and in this case also, the aforementioned distinction of nearness of relation should be applied. In the absence of Gotrajas, Bandhus take the wealth. Bandhus are of three kinds, *viz.*, Átmabandhus, Pitribandhus and Mátribandhus; as is laid down by Vriddhasátátapa: "The sons of one's father's sister, the son's of one's mother's sister, and the sons of one's mother's brother, are known as Átmabandhus. The sons of one's father's father's sister, the sons of one's father's mother's sister, and the sons of one's father's mother's brother are known as one's Pitribandhus. The sons of one's mother's father's sister, the sons of one's mother's mother's sister, and the sons of one's mother's mother's brother, are known as Mátribandhus."[1] In this case also, according to the order of enumeration, the Átmabandhus get the wealth first, because of their nearness of relation. Similarly, in default of them the Pitribandhus; and likewise in default of the Pitribandhus, the Mátribandhus. This is the order. In default of even the bandhus, the preceptor (takes;) and in default of the preceptor, the pupil.

So also, Ápastamba: "In the absence of sons, the nearest sapinda relation takes; in his default, the preceptor; in his default, the disciple; in default of the disciple, a fellow-student, whose Upanayana was celebrated by, or who was studying under, the same preceptor (as the deceased); in default of the fellow-disciple also, Srotriyas inherit the wealth."[2]

This is laid down by Gautama: "Srotriyas shall take the wealth of a deceased Brahmin leaving no issue."[3] A Srotriya] one who has studied one Sákhá (of the Veda). In the absence of even a Srotriya, any Brahmin who is near shall take.

1. Attributed to Baudhayana in many places but not found.
2. Ápastamba, II. 6, 14, 2 & 3.
3. Gautama, XXVIII, 41.

So also Manu: "In default of all, Brahmins who are well-versed in the three Vedas, pure and who have controlled their senses, shall take the wealth."[1] Never shall the king take the wealth of a Brahmin; for it is stated by Nárada: "The wealth of a Brahmin, on his death without any heir, should be given only to Brahmins; otherwise the king becomes tainted with sin."[2]

Manu: "The wealth of a Brahmin shall never be taken by the king; this is eternal law."[3]

The wealth of a Kshatriya, etc., in the absence of all heirs down to the fellow-student is taken not by Brahmins but certainly by the king. That is laid down by Manu: "The wealth of persons of other castes, in the absence of all heirs, the king takes."[4]

Yájñavalkya states an exception to the mode of inheriting by sons, etc., in order: "The heirs to the wealth of an ascetic, a sanyasin and a brahmacharin are in their order, the preceptor, the virtuous disciple, and the brother in holiness of the same order."[5] Brahmachárin] permanent student, not one who wishes to pass into the order of a householder. Virtuous disciple] one who has studied and meditated upon the knowledge of Átman. Brother in holiness] one who is regarded as a brother. Ekatirthi] one of the same order of life, *i.e.*, an ascetic who lives in the same order. One who is a brother in holiness and belongs to the same order of life is a brother in holiness of the same order. Here the word 'order' (in 'in their order') intends inverse order. (Thus) the wealth of an ascetic, *i.e.*, food, etc., acquired in the manner laid down in the text: "Let him hoard wealth sufficient for a day, a month, six months or a year, and let him abandon all that in the month of Asvayuja,"[6] a fellow-student takes. The wealth of a sanyasin consisting of cloths, books, etc., the virtuous disciple takes. The wealth of a permanent student consisting of books, etc., the preceptor takes.

*Partition among reunited brothers.*

On this subject, Yájñavalkya: "A reunited brother shall take the wealth of a reunited brother; and a uterine brother that of a uterine brother. One born of a different mother, if reunited, shall

1. Manu, IX. 188.
2. Not found.
3. Manu, IX. 189.
4. Do.
5. Yajnavalkya, II, 140.
6. *Ibid.*, III, 47.

take the wealth; but not one born of a different mother if not reunited. A uterine brother even if not reunited shall obtain (the wealth) and not a brother born of a different mother, even though reunited".[1] The property which was once divided but afterwards mixed is called samsrishta; he who has such wealth is called samsrishtin (reunited). The wealth of such a person if he dies without sons or grandsons, the reunited parcener shall take, even though his wife be present. The singular in 'samsrishti' is purposeless. Therefore (the meaning is) the reunited parceners shall divide the wealth and take their shares; and they shall also maintain the widow (of the deceased).

Reunion can take place only with the father, brothers and paternal uncles, and with nobody else. That is laid down by Brihaspati: "He who being once divided, lives again, through affection, together with his father, brother or paternal uncle, is termed reunited."[2] If while the wife of the deceased, whose pregnancy was not manifest, was alive the reunited parcener's divide and take his wealth, and if subsequently of this pregnancy a son be born, then the wealth of the reunited parcener should be handed over to the son; it is to be understood in the latter portion also.

"A uterine brother of a uterine brother"; the wealth of a reunited parcener, a mere reunited parcener alone shall not take, but a uterine brother shall take; not a half-brother. "One born of a different mother, if reunited, (shall take the wealth); but not one born of a different mother, if not reunited; a uterine brother shall take even though not reunited; but not one born of a different mother though reunited." One born of a different mother, if he be reunited, shall take the wealth; one born of a different mother if he is not reunited shall not take. This is inferred by the use of the expression 'even if not reunited' in the text: "A uterine brother shall take even if not reunited." In the case of the half-brother, reunion alone is the ground of his taking the wealth; the word 'not reunited' is equally related to both what follows and what precedes, like the eye of a crow. Therefore 'though not reunited, he takes the wealth if united' is a separate sentence. 'Though not reunited', *i.e.*, though his separate wealth had not been mingled with the wealth of others. One reunited, born of the same womb takes the wealth of the

1. Yajnavalkya, II. 138 & 139. 2. Brihaspati, XXV. 72.

deceased reunited brother. By this it is indicated that his being uterine is the only ground of his taking the wealth. Here the word 'not reunited' is understood in the latter half of the passage also as it is in the former. Therefore 'one born of a different mother, even though reunited shall not (take)' is the latter portion of the text. In this sentence by the word 're-united' is denoted '(any) reunited parcener' and not only 'a uterine brother reunited.' Even if the reunited be one born of a different mother, the brother born of a different mother alone takes the wealth. Here the particle 'eva' (alone) if taken in the light of Manu's text means this. Where there is a uterine brother not reunited and a half-brother reunited, then the uterine brother shall get a share of the wealth, owing to his being born of the same mother; and the half-brother also takes another share owing to the existence in his case of the relation of reunion.

Manu also: "If divided brothers again living together institute a second partition, then the partition shall be equal; there is no right of primogeniture in this case. The deduction for the eldest is one-twentieth of the property and the best of all chattels"[1]; the meaning is nothing implying unequal partition should take place. Likewise: "If among them, one whether the eldest or the youngest loses his share or dies before partition, his share is not lost."[2] The meaning is this: if among reunited brothers one whether eldest or youngest, is, before shares are allotted, deprived of his share on account of entering another order or being put out of caste, or dies, his share is not lost. His share therefore should be separated and kept; but they should not divide and take it. How the separately kept property should be disposed of is laid down thus: "Such of his uterine brothers as are reunited, having assembled shall divide his wealth, as also uterine sisters."[3] In these two texts by the use of the two expressions 'uterine brothers' and 'brothers', 'uterine brothers' should be understood to mean 'brothers born of the same mother' and 'brothers' to mean 'brothers born of different mothers'; otherwise there would be redundancy. 'Those of his uterine brothers who are reunited'; here by the use of the expression 'reunited' it is meant that those uterine brothers who are denoted by that expression shall

1. Manu, IX. 113. 2. Manu, IX. 211. 3. *Ibid* IX. 212,

divide; and by the word 'reunited' not being used, even those uterine brothers who are not reunited are also meant. Therefore the meaning of the text is this: the uterine brothers though not reunited, and likewise those who have gone to a foreign country shall assemble together and divide the reserved wealth in equal shares, *i.e.*, with no greater and less shares. So also those reunited half-brothers of the same caste; and also uterine sisters. The meaning is that all those from uterine brothers to uterine sisters shall divide the wealth in equal shares. The partition in the case of reunited half-brothers of other castes shall be according to the rule laid down in the text: 'four, three, two and one share respectively'. As the use of the word 'samam' is sufficiently justified by its application to the case of half-brothers of the same caste, excluding brothers of different caste, there is nothing to prevent the application of the rule in the text, 'they take four, three, two and one shares respectively.'

Sankha says: "If one among the brothers die leaving no issue, or if one of them enter another order; the rest (of the brothers) shall divide his wealth, excepting the stridhana; or they should give maintenance for life to those of his wives as keep unsullied their husband's bed; and they may cut off that allowance in the case of others."[1] Others] those who do not keep their husband's bed unsullied.

Brihaspati: "He among the reunited parceners who earns more wealth by his learning, valor, etc., should be given two shares; and the rest shall be equal sharers."[2] The allotment of two shares should be understood in case he acquires greater wealth. Here the meaning is this: In default of reunited half-brothers, he among the uterine brothers who is reunited shall take the wealth of a reunited brother dying without issue; in default of not reunited uterine brother, he among the half-brothers who is reunited shall alone take the wealth. Here also among half-brothers, if some of them are of the same caste and others of dissimilar castes, then it should be inferred that the rule laid down in the text: 'they take four, three, two and one shares respectively' applies. Where the deceased's uterine brothers and half-brothers are reunited, then all of them shall take in the manner above mentioned. If the reunited brothers

1. Narada, XIII. 25 and 26. 2. Brihaspati, XXV. 77.

are half-brothers, and the non-reunited are uterine, then also uterine and half brothers shall take; if the reunited brothers are uterine and the non-reunited are half-brothers, then the uterine brothers alone shall take. If some of the uterine brothers are reunited and some others are not, then the reunited uterine brothers shall take; because of their double relation, *viz.*, being reunited and being uterine. In all cases the widow gets her maintenance. Some say that the distinction here stated between brothers arising from being born of the same mother and of different mothers should be applied in the case of father's uterine brothers and father's half-brothers, by parity of reasoning. That is not reasonable; the text 'of the uterine brother, the uterine brother' lays down a special rule; as there is no reason to think that reunited brothers alone are not meant by the text, the term 'uterine brother' cannot include the paternal uncle, and as such a construction is inconsistent with the practice in the world; the mode of reasoning does not apply here, being opposed to the express texts. Therefore the whole is unexceptionable.

*Persons incompetent to inherit.*

On this subject, Yájñavalkya: "The impotent, the outcast, his son, the lame, the insane, the idiot, the blind, and persons suffering from incurable diseases; these should be maintained, they being ineligible for a share."[1] His son] the son begotten by an outcast before the prayaschitta (expiation) is performed. Lame] devoid of a leg. The insane] incurably affected with insanity due to the combined effect of wind, bile and phlegm or to devil-possession. Idiot] one whose mental faculties are impaired, *i.e.*, one who is incompetent to know what is good from what is bad. Persons suffering from incurable disease] persons suffering from chronic diseases as scrofula, etc. By the particle 'etc.' are included the enemy of the father, etc.

Likewise Nárada: "The enemy of the father, the degraded, the impotent, one who has committed sin, these, even though they be aurasas, do not get shares. How could they if they be kshetrajas?"[2]

Vasishtha: "Persons who have entered a different order are shareless."[3] Different order] the orders of a perpetual student, ascetic and sanyasin.

1. Yajnavalkya, II. 140. 2. Nanda, XIII. 21, 3. Vasishtha, XVII. 52.

Manu: "The impotent and the degraded, persons deaf and blind, from their birth, likewise the insane, the idiot and the dumb and also those who are devoid of an organ, are shareless."[1] Persons devoid of an organ] persons whose sensory organs have been impaired by disease and the like. These do not get shares, but should be maintained. So says Manu: "It is proper that wise men should give according to ability maintenance to these without stint; if he does not give, he shall become degraded."[2] These] persons excluded from inheritance. Without stint] for life. The exclusion of these from inheritance is only where prior to division they are subject to irremediable defects; but if one subject to defect, at the time of partition, is cured of it after partition by medicine, etc., or by expiatory ceremonies, then he certainly gets his share on the principle laid down in the text: "the son begotten after division on a woman of the same caste takes a share."[3] The masculine gender in the words, *patita*, etc., is of no consequence, being found in the terms denoting the subject. Therefore the mother, the wife and the daughters if ill-behaved are certainly shareless. The impotent and the rest alone are incompetent to inherit; not their sons if they are free from defect.

So also Yájñavalkya: "The *aurasa* and the *kshetraja* sons of these are takers of a share if they are free from defect. The daughters of these should be maintained till they are provided with husbands. The sonless wives of these conducting themselves aright should be maintained, but if they are unchaste and perverse, they should be expelled."[4] The impotent can have only kshetraja sons; the rest may have aurasa and kshetraja sons. By the mention of aurasa and kshetraja sons alone, it is understood that the other kinds of sons have no shares. The appointed daughter also gets a share, as she is equal to the aurasa. So she is also denoted by the term 'aurasa'. The daughters are to be maintained however till marriage. The sonless wives of the impotent and the rest if well-behaved should be maintained. But the unchaste wives should be expelled.

Accordingly it is said: "The wives who are unchaste and perverse likewise should be expelled." Should only be driven out: the perverse should be maintained, as they are free from unchastity.

1. Manu, IX. 201.
2. *Ibid*, IX. 202.
3. Yajnavalkya, II. 122.
4. *Ibid*, II. 141 and 142.

*On impartible property.*

On this point Yajnavalkya: "What else is acquired by oneself without detriment to the paternal estate, as presents from a friend, and gifts at the time of marriage, do not belong to the (rest of the) coheirs. He among the coheirs who recovers property descended in regular succession but taken away, need not give to the rest of the coheirs; as also wealth acquired by learning."[1] Without detriment to the paternal wealth] no injury being done to the father's wealth; this goes with 'presents from a friend, etc.' Presents by a friend] what was received from a friend. That parcener who among coparceners, such as sons, etc., recovers after being permitted property which was duly descended from father to son, but which was taken away by others and which was not recovered by the father and the rest owing to lack of ability, need not give that property to the other coheirs. But the recoverer only shall take it.

Sankha, however, states a distinction in the case of land which was taken away and subsequently recovered: "He who recovers by labor the land previously lost shall be given a fourth part and the rest shall divide according to shares."[2] The meaning is that the rest of the coheirs should, after giving to the recoverer a fourth part, divide the remaining land with the recoverer and take their respective shares. Wealth acquired by learning] acquired (as remuneration) for teaching, explaining the purport of the Vedas, the recitation of the Vedas, and for studying the Vedas, etc. As impartibility is stated as regards the property acquired from friends, etc., only when it is gained without any detriment to the paternal wealth, it is in effect said that presents from a friend, etc., when acquired to the detriment of the paternal estate are certainly divisible.

Here as the expression 'acquired without detriment to the paternal estate' qualifies only 'wealth got as presents from friends etc., or for learning'; therefore it is understood that wealth acquired as acceptance of gift even to the detriment of the paternal wealth, is certainly divisible; and such a practice is also observed.

Nárada: "A brother who looks after the family of another brother engaged in the acquisition of knowledge, shall get a share

1. *Ibid*, II. 118 and 119. 2. II. Col. Dig. 464. CCLIX.

in the wealth, acquired by such learning, even though unlearned himself."[1]

Kátyáyana: "Wealth obtained by learning acquired while being maintained by another is called wealth acquired by learning."[2]

Manu: "Let one not give to his coheirs what was acquired by him by labor, without injury to the paternal wealth; as also wealth obtained by learning."[3] By labor] by service, war, etc.

Similarly: "Cloths, vehicles, ornaments, cooked rice, water and women, yogakshema and pasture ground for cattle; these are declared impartible."[4] The impartibility stated in respect of cloths is only in the case of cloths that have been worn. Vehicle] carriage, horse, palanquins, etc. In this case whatever is used by one should not be divided; or *patra* may mean money secured by documents.

So also Brihaspati: "Having discharged the debts secured by documents."[5] Discharged] paid up.

Kátyáyana: "Money secured by bonds." Here the meaning is this: only so much of the debts, as is undischarged, is impartible.

Brihaspati: "The manner above mentioned should be understood to apply in the case of debts secured by bonds. That should be cleverly divided, or else it will become useless. The cloths and ornaments should be divided, by selling them; the debts secured by documents by discharging them; and dressed rice by exchanging it for undressed rice."[6] Where there are many horses, etc., they are certainly divisible among parceners where they live by dealing in such animals. If goats, etc., are indivisible, being unequal in number, then they belong to the eldest.

So also Manu: "A single goat or sheep should never be divided. It is declared that a single goat or sheep should be given to the eldest."[7] Whatever ornaments are worn by any one are indivisible. So Manu: "The ornaments worn by females during the lifetime of the husband, let the coheirs not take; if they take,

1. Narada XIII. 10.
2. II. Cole. Dig. 444. CCCXLVII.
3. Manu, IX. 208.
4. *Ibid* IX. 218.
5. Brihaspati, XXV.
6. Brihaspati, XXV. 80 and 81.
7. Manu, IX. 119.

they shall be degraded."[1] Here 'worn' means given to them out of affection, etc., to wear so as to produce in them an exclusive ownership. Dressed rice] cakes, etc. That should be eaten by all the coheirs together. Water] its reservoir, *i.e.*, wells, etc.; this too is indivisible; but should be made use of by turns. Women] female slaves; women of the seraglio. Where the female slaves are unequal in number, they should be made to do duty by turns; if they are equal in number, they should be divided. Even if the women of the seraglio are equal in number, they are not divisible.

That is laid down by Gautama: "There is no division of females who had had cohabitation."[2] Females who had had cohabitation] women of the seraglio. Yogakshema]; Yoga is the getting of what was not got already; by the word 'Yoga' are denoted those rites performable by srauta and smárta fires which are the causes of acquiring what was not got already. By the word 'kshema' are denoted conservatory acts such as gifts outside the altar, construction of tanks, laying out of gardens, etc., for the purpose of protecting what has been already acquired.

These two, though belonging to the father are not divisible; even though to the detriment of the paternal wealth, they are not divisible; according to the text of Laugakshi: "Kshema is a conservatory act; Yoga is a sacrificial act; so sages declare. They are declared to be impartible, as also bed and chairs."[3] Some others hold that by the term 'Yogakshema' are meant ministers, purohits, who afford prosperity (Yogakshema); others yet are of opinion that missiles, cowtails, umbrellas, shoes and the like are meant. Prachára] the way of ingress and egress to and from houses, gardens, etc. Here 'inequality' means inequality in the value of shares given and not in the number of articles given; as, if there are four sons and three horses, here, the inequality is due to the indivisibility into four shares.

As for another text: "Sacrificial things, kshema, vehicle, dressed rice, water and women; these are indivisible among sagotras even though descended for a thousand generations",[4] that has reference to the kshatriya and other sons of a man of the Brahmin

1. *Ibid* IX. 200.
2. Gautama, XXVIII. 47.
3. Not found.
4. Not found.

caste; because of the particular text: "Land obtained by acceptance of gift should never be given to the kshatriya son, etc."[1] Sacrificial things] things obtained by sacrifices.

It has been said that wealth acquired by valor, etc., is indivisible; but Vyása lays down an exception: "If a coheir depending on common wealth gain by valor something such as carriages, etc., the brothers are sharers therein."[2] Common] mingled wealth; depending upon it.

Yájñavalkya: "In the case of an addition made to the common wealth, the division is declared equal."[3] The meaning is that if the united wealth is increased by agriculture, trade, etc., then the shares of all are equal, and two shares should not be given to the acquirer.

*Supplementary provisions regarding partition.*

On this subject, Yájñavalkya: "Property withheld by one coheir from another and which subsequently comes to light, they shall again divide it in equal shares; this is fixed law."[4] The meaning is that if any property concealed from one another is discovered after partition, they shall divide it in equal shares only; they need not give a deduction of one-twentieth in favor of the eldest according to the text: "To the eldest, a twentieth."[5]

Likewise: "In case the partition is doubted, the fact of partition should be ascertained by means of relatives, bandhus, witnesses and documents and by houses and lands separately held."[6] If after partition a doubt arises in course of time as to the fact of partition, then the ascertainment of the partition should be made by means of gnatis, paternal relations, maternal relations as maternal uncles according to the aforesaid description, by witnesses and written partition-deed, and likewise by separate possession of houses and lands. The meaning is that it may also be ascertained by their separate performance of agriculture, and of the five mahayajnas.

Narada: "If a doubt exist about the fact of partition, then it should be ascertained by gnatis, partition-deed and separate

1. Brihaspati, XXV. 30.
2. II. Cole. Dig. 281, CX.
3. Yajnavalkya, II. 120.
4. *Ibid* II. 126.
5. Manu, IX. 112.
6. Yajnavalkya, II. 149.

transaction of affairs. Among unseparated brothers the performance of religious duties is single; when partition has indeed been instituted, the performance becomes separate. Separate, not unseparated brothers can bear witness, stand surety, make and accept gifts."[1] Similarly: "If many persons born of the same man be separate in transaction of affairs, and religious rites and have separate implements of work, and do not consult each other in all affairs, they may even give away or sell their own shares; they can do all this as they please; for they are masters of their own wealth."[2]

Brihaspati: "Coheirs, whether separated or unseparated, are alike in immoveable property; one is not qualified to give it away, to pledge, or to sell it."[3] Adhamána] pledging. This too is to facilitate the transaction of affairs and not to establish the fact of partition.

Here ends the Eighth Chapter of the Madana Parijata.

## NOTES OF INDIAN CASES.

**Muthayya Chetti *v.* Secretary of State for India.** I. L. R., 22 M., 100. One is naturally tempted to ask the question, can this decision be good law? A piece of land, which, according to the finding of the High Court, must be taken to be the property of the Government, was occupied by the plaintiff as a trespasser. The Government instead of seeking to eject him by process of law adopted the unjustifiable procedure of imposing a penal assessment and compelling him to give up the land. He declined to pay, and, as regards some of the instalments, it was admitted that the Government destrained his goods. He paid the amount under protest and sued for the recovery of the money. Curiously enough *Boddam*, J., holds that the plaintiff's remedy is an action for illegal distress. A payment under pressure of coercive process, the legality of which *Boddam*, J., does not decide, is a payment which the person paying is entitled to recover if the coercive process was illegal. S. 72 of the Contract Act and the cases thereon are sufficient authority for the recovery of the money. But, of course, the question remains if the coercive process was illegal. The land was the property of Govern-

1. Narada, XIII. 36-39. 2. *Ibid* XIII. 42 and 43.
3. Brihaspati, XXV. 93.

ment, and we think there is no right to impose assessment upon it. Rent can only be recoverable by agreement of parties. Government might be entitled to damages for trespass, but that does not seem to be recoverable under the Act. We cannot but regret the conclusion that Government is at liberty to drive the trespasser away without going to regular courts of law like other persons whose properties have been trespassed upon by adopting the questionable and demoralizing procedure of imposing a penal assessment.

**Sriramulu v. Ramasami**, I. L. R., 22 M., 109. A petition for revision under S. 622 having been rejected, an appeal under the Letters Patent was preferred. *Davies* and *Boddam*, JJ., who delivered somewhat extraordinary judgments in the Full Bench Case of *Chappan* v. *Moidin Kutti*, I. L. R., 22 M., 68, held that there was no appeal. Merely declining to exercise the revisional power under S. 622 may not be a judgment, but dismissal of the petition in the exercise of the power is a judgment. We do not quarrel with the conclusion, but the reasoning is certainly peculiar. Mr. Justice *Davies* holds in the Full Bench Case that the revisional power does not fall within the words "appellate jurisdiction" of the Letters Patent.

The High Court has the power to frame rules for Benches of one or more Judges disposing of cases falling within the original or appellate jurisdiction. If revisional power does not fall within either of these jurisdictions according to *Davies*, J., it follows necessarily that a rule framed by the High Court authorizing one or more Judges to dispose of revision cases is *ultra vires*. His Lordship appears to us therefore to be wrong in relying upon the rule as a justification for one Judge disposing of a revision case.

**Gur Prasad v. Ram Lal**, I. L. R., 21 A., 20. It has been decided that the purchaser of the equity of redemption after a decree for the mortgage money has been passed in favour of the mortgagee, is the representative of the judgment-debtor within the meaning of S. 244. See *Ishan Chunder Sirkar* v. *Beni Madhub Sirkar*, I.L.R., 24 C. 62. *See* also *Paramanada Doss* v. *Mahabir Dossji*, I. L. R., 20 M., 378. It seems clear that the purchaser of attached property must stand upon the same footing and is entitled to raise any question under S. 244. It may be questionable whether in the absence of a subsisting attachment, and there is only a money decree, the purchaser of the judgment-debtor's property can claim to be representative. But the question in the case under notice seems to be free from difficulty.

**Muhammad Husen v. Muzaffer Husen**, I. L. R., 21 A. 22. In the case of a local Act where the last day for the filing of a suit happens to

be a Sunday the question is raised whether the period of limitation provided by the Act will be extended to the next day. *Aikman*, J., says 'no'. The learned Judge holds that S. 8 of the Limitation Act does not apply, nor the General Clauses Act of 1887. But the question is not considered whether there is any general principle, according to which there being an incapacity on the part of the Court to permit the act to be done by the party, time cannot be extended to the next court day. The Madras High Court apparently acted upon this rule. See *Aravamudu Aiyangar* v. *Samiyappa Nadan*, I. L. R., 21 M., 385.

---

## SUMMARY OF RECENT CASES.

*Will—Insane delusions—Relevancy.*

### Hope *v.* Campbell [1899] A. C. 1.

A testator left his properties in trust for certain religious and charitable purposes, namely, the promotion of total abstinence from the use of intoxicating liquors, the dissemination of the doctrines of Protestantism, the suppression of Popery, etc. His heir-at-law and next-of-kin brought an action against his trustees and executors for the cancellation of the will and for the recovery of his properties. The material averment of the 'pursuers' is as follows:—"Upon both the said topics"—referring to total abstinence from spirituous liquors and the Church of Rome—"he was subject to insane delusions." He believed that he had a special and imperative duty to further the cause of total abstinence and to oppose the Church of Rome by devoting his pecuniary resources to these objects, in consequence of commands which he had received from the Deity by direct communication upon various occasions. These insane delusions dominated his mind and overmastered his judgment to such an extent as to render him incapable of making a reasonable and proper settlement of his means and estate, or of taking a rational view of the matters to be considered in making a will." It was, however, admitted that in other respects he was sane and was actively engaged up to his death in carrying on a large business as writer to the Signet. On these facts and admissions, the Lord Ordinary and the Court of Session agreed in holding that the averments were insufficient to support the 'conclusions' of a summons.

*Held* on appeal to the House of Lords, (per Lords *Watson* and *Shand*, Lord *Davey diss.*) that a substantial issue had been raised by the averment and that the case must go to trial upon it.

*Per Lord Davey*:—The allegation amounts only to this that the testator "believed that the Divine Spirit spoke to him through his conscience and his action was directed by what he considered to be the command of the Almighty so conveyed." There is, therefore, no relevant averment of insanity, such as will support an action for the 'reduction' and cancellation of the will.

---

*Prescriptive right—Statute—Extinction.*

**New Windsor Corporation v. Taylor** [1899] A. C., 41.

Where an Act of Parliament "has 'embraced and confirmed' a right which had previously existed by custom or prescription, the right thenceforward exists by statutory right and the lower title by custom or prescription is merged in, and extinguished by, the higher title derived from the Act of Parliament."

The Municipal Corporation of New Windsor were from time immemorial in the habit of taking tolls for the passage over a wooden bridge crossing the Thames. In 1734 the Parliament passed a Statute, 9 Geo. II., c. 15, in which the prescriptive right was recited and the Mayor, &c., of Windsor were authorised to levy tolls for passage over the bridge of all hackneys, except those of freemen. This statute was repealed by 59 Geo. III., c. 126, which was to be in force for 21 years. At the end of this period, it was renewed by 5 Vic., c. 8, for 31 years. At the end of this latter period the Corporation made no attempt to have the statute renewed. But they levied tolls from the respondent under their prescriptive right. The respondent paid it under protest and brought action to recover the money so paid. The question for the Court was whether the prescriptive right to levy tolls had not been extinguished by 9 Geo. II., and whether in the absence of any subsisting statute authorising the levy of tolls the Corporation had the right to fall back upon their original customary right. *Russell*, C. J., gave judgment for the Corporation. The Court of Appeal (*A. L. Smith*, *Rigby* and *Collins*, L., C. J., reversed his decree and entered judgment for the plaintiff.

On appeal by the Corporation, *held* by the House of Lords that the statute recited the custom and authorised the levy of the customary toll with a slight modification, that thenceforward there was only a statutory right available to the Corporation, that the Corporation could not rely upon the prescriptive right after the expiry of the statute and that the judgment of the Court of Appeal should be confirmed.

---

*Lottery—Prediction—Skill.*

**Hall** *v.* **Cox** [1899] 1 Q. B., 198.

Where the result of a prize competition does not depend *entirely* upon chance, it is not lottery and the contract can be enforced. The defendant, editor of a newspaper, offered a prize for a correct prediction of births and deaths in London during a particular week. *Held* by the Court of Appeal reversing the order of *Lawrence*, J., that the competition required skill and knowledge of statistics and did not depend solely upon chance, and that, therefore, the contract not being in the nature of lottery could be enforced.

---

*Railway Co.—Bicycle—"Ordinary luggage."*

**Britten** *v.* **G. N. R. Co.** [1899] 1 Q. B., 243.

A passenger who carried a bicycle with him insisted upon being allowed to carry it without paying any special charge, as it was within the statutory weight allowed for each passenger. But the Company refused to carry it free of charge on the ground that a bicycle was not an 'ordinary luggage' within the Act. The passenger paid the charge under protest and brought an action to recover the money levied from him. *Held* by *Channell*, J., that the bicycle was not "ordinary luggage," and the Company was not bound to carry it free of charge, though within the weight allowed for each passenger.

---

*Workmen's Compensation Act (60 and 61 Vict., c. 37), S. 1—Injury "arising out of or in the course of the employment."*

**Lowe** *v.* **Pearson** [1899] 1 Q. B., 261.

The plaintiff "was employed in the mere manual labour of making balls of clay and handing them to the woman employed in working the machine. It was no part of his duty to touch the machinery; but on the contrary he was expressly ordered not to do so. In spite of these orders he meddled with the machinery and got his fingers injured." Under these circumstances he brought an action for compensation for injury "arising out of and in the course of his employment." The County Court Judge held that his object in meddling with the machinery having been the furthering of his master's work, he was entitled to compensation, notwithstanding the fact that it was no part of his duty to do it, and that he was not asked to do it on the particular occasion on which he injured himself. *Held* by the Court of Appeal in reversal of

this order, that the plaintiff had no business to approach the machinery, that, therefore, the injury could not be said to have arisen out of or in the course of the employment, and that the plaintiff was not entitled to maintain the suit.

---

*Criminal jurisdiction—False representations made in Scotland—Goods obtained in England.*

**Reg v. Ellis [1899] 1 Q. B., 230.**

The prisoner, a draper of Durham, obtained goods in Durham on false representations made by him in Glasgow. The question stated by *Day*, J., for the consideration of the Court of Crown Cases Reserved was whether the case was triable in England.

*Held* by *Hawkins*, *Wills* and *Bruce*, JJ., that the false representations made in Scotland were not in themselves criminal apart from the subsequent receipt of goods in pursuance thereof, and that the receipt of goods, which was the foundation of the indictment, having been in England, English Courts had jurisdiction to try the offence.

*Held* per *Wright*, J., that the larger question should be left open, but that the conviction of the lower Court should be affirmed on the ground that the possession of the goods by the prisoner might be treated as a possession in Gabeshead under a representation in Glasgow and continuing in Gabeshead (in Durham).

---

## JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the receipt of the following publications :—

*The Law of Partnership*, by A. Underhill, M.A., LL.D., published by *Messrs. Butterworth and Co., 7 Fleet Street, E. C., London.*

*State Library Bulletin.* Legislation No. 10 from the University of the State of New York.

*Quarterly Advance Sheets* of the General Digest, American and English, published by *The Lawyers' Co-Operative Publishing Company, Rochester, New York*:—Price $ 1/.

*The Yearly Abridgment of Reports* by Murray for 1898, published by *Messrs. Butterworth and Co., 7 Fleet Street, E. C., London*:—Price S. 12/6.

The Lawyer and Magistrate, Nos. 3, 4 and 5 (*in exchange*).

The Bombay Law Reporter for March (*in exchange*).

The Albany Law Journal for March (*in exchange*).

The Calcutta Weekly Notes for March (*in exchange*).

The Allahabad Weekly Notes for March (*in exchange*).

The Green Bag for March (*in exchange*).

The Canadian Law Times for March (*in exchange*).

The Canada Law Journal for March (*in exchange*).

The Educational Review for March (*in exchange*).

The Indian Journal of Education for March (*in exchange*).

The Harvard Law Review for March (*in exchange*).

***

*Vakil carrying on business*:—A notification has been issued by the High Court and published in the *Fort St. George Gazette*, that a vakil carrying on any trade or business without the leave of the Court shall be liable to suspension or dismissal. This rule appears to have been framed in consequence of a vakil of the High Court practising in the moffusil having carried on the business of a cloth merchant. We have no doubt that it is undesirable that members of an honorable profession should be simultaneously engaged in the business of a trader along with the active practice of the profession. We are not aware of any other instance of a vakil engaged in any similar trade or business. Professional opinion ought to be sufficient to check any practice of this kind inconsistent with the traditions of the bar. An appeal by the High Court to the body of professional gentlemen in Madras and in the moffusil would have been quite enough to preserve the profession from mistakes of the kind that has come under the notice of the High Court.

The promulgation, however, of a rule like the one under notice appears to us to be alike illegal and undesirable. In the case of pleaders the High Court has the power under S. 6 of the Legal Practitioners' Act to frame rules for their suspension and dismissal, and the rule has been made by the High Court at Madras that the carrying on of a trade or business would render a pleader liable to suspension or dismissal. But in the case of advocates, vakils and attorneys of the High Court, the High Court has the power to make rules for the qualification and admission of proper persons, but there is no power to make rules for their suspension or dismissal. The Letters Patent simply say: " The

High Court has power to suspend or remove from practice on reasonable cause." The reasonable cause is a matter for judicial determination in each case by the court as a judicial body upon the circumstances placed before them. A judgment of the High Court judicially pronounced as to what is reasonable cause may have a binding authority like any decision of the Court. But an extra-judicial rule framed without reference to any case which has come up judicially before the Court cannot have any binding force upon the court which may have to determine the question in any particular case. The power to suspend or dismiss a vakil being no part of the original or appellate jurisdiction, for the exercise of which the power to form Benches is conferred under S. 13 of the Charter Act, has to be exercised by the whole High Court upon any complaint made, or of their own motion, against any advocate, vakil, or attorney charged with misconduct. The exercise of such a power depending upon judicial precedents in this country and in England as to what constitutes reasonable cause cannot be fettered by any rule framed in *camera.* Nor does it appear to us that there is any power to frame rules in the matter under S. 15 of the Charter Act which confers the power to frame rules of practice for subordinate Courts, or under S. 652 of the Code of Civil Procedure which authorizes the High Court to make rules consistent with the Code to regulate any matter connected with its own *procedure.* It is hardly necessary to observe that the suspension of an advocate or vakil is not a matter connected with the procedure of the Court.

We said that the rule was also undesirable. In the first place there is no reason why the rule should be made applicable to vakils alone. If the carrying on of a trade or business is objectionable in their case, it is equally objectionable in the case of advocates and attorneys. Again, the rule is very vague, for it is difficult to define what a business is.

We have no doubt that the promulgation of the rule is well-meant. But the Judges could hardly have realized the scope of the words employed at the time when the draft was under their consideration. In one sense the conduct of this journal may be business. Lending money on the security of property out of professional savings may be business. But we can hardly suppose—indeed we are assured—that these instances were never intended to fall within the rule. There are many things which should be left to the good sense of the profession and the general body of public opinion to be regulated. The framing of rules not carefully considered with reference to actual facts and not subjected to any criticism before they are authoritatively issued is always beset with the

danger of striking at things never intended to be prohibited. We trust that the rule under notice will be withdrawn before long.

***

*Enrolment of Vakils.*—There have been two instances during this year when enrolment was refused. Two apprentices had each served a year under a professional gentleman practising in the High Court. One of the cases was a very gross case of a man who had beendismissed from the public service for gross misbehaviour, but who after his dimissal took his B.L. degree and served his apprenticeship without informing his master of his previous history. Somehow the circumstances were brought to the notice of the Court, and when the motion came to be made, the Chief Justice ascertained on a careful examination that the applicant was thoroughly unfit to belong to an honorable profession and refused his enrolment. It is a pity that the motion should at all have been made in this case.

The rules in regard to enrolment provide that a notice should be given by each applicant four weeks before enrolment in the *Fort Saint George Gazette* of his intention to apply, and also by publishing it on the notice board of the High Court. It is impossible to expect vakils of the High Court, or any persons interested in the honor of the profession, to be on the look-out for such notices and then to satisfy themselves as to whether the applicant is a man of good character. We think a rule should be framed requiring each apprentice-at-law within 30 days after signing the contract to notify to the Vakils' Association the fact of his having entered into the contract of apprenticeship. This will give members of the association an opportunity to inquire and to satisfy themselves as to the fitness of the candidates for enrolment and to oppose if necessary the admission of any objectionable candidate.

As regards the other case, we regret we cannot agree with the view taken by the Court in the peculiar circumstances in which the application was made. The applicant was a First-grade Pleader and some time a Police Inspector. It is said that he resigned the service under somewhat discreditable circumstances, and his pleader's certificate was in consequence not renewed for one year. It is pretty certain that the certificate would have been renewed after the lapse of that year. The applicant, however, thought of utilizing the year's suspension by going through a course of apprenticeship for enrolment as a vakil of the High Court. Before entering upon the course of apprenticeship, he took the opinion of the High Court by placing the circumstances in connection with his previous history before the Judges. The Judges endorsed their order

upon the petition that he was at liberty to apprentice himself, but should not practice as a pleader. It is true that the Judges were not bound to give this opinion, but it is impossible to regard this as anything but a sanction of the course the applicant proposed to adopt. In the face of all this to tell the applicant that the High Court was not bound to advise, and that the order meant that the applicant was free to act as he pleased, was to put a construction utterly at variance with the letter and spirit of the order and with the previous refusal to renew the pleader's certificate for a year only. It is true that the applicant was permitted to renew his application before *Shephard* and *Davies*, J.J., but we think the refusal was extremely unfair to the applicant. The matter might be viewed differently, but for the previous orders of the High Court. We do not mean to suggest that because a man told a lie once, for which he was adequately punished, he should ever afterwards be precluded from entering into a profession which is a means of honorable employment. But there would not be the same sympathy with the applicant as there undoubtedly is at present in the circumstances in which the application was refused.

***

*Ways of necessity—what are they?*—It is a common impression that a way of necessity may be demanded wherever a landowner finds that he has no access to his property except over the lands of others. That this impression is mistaken is shown by the case of *Ellis* v. *Blue Mountain Ass'n*, 41 Atl. Rep. 856, decided by the Supreme Court of New Hampshire. There the plaintiff owned a farm situated in the centre of Corbin Park—a game preserve. A public highway running completely through the park was the sole means of access to the farm. The owner of the park prevailed on the town officials to exercise their statutory authority and abolish this highway; whereupon the plaintiff filed a bill to have a way of necessity laid out and to have the park owner enjoined from allowing his wild animals to trespass on the plaintiff's land. The injunction was granted, but the way was refused. The result is peculiar. The farm is carefully protected for the plaintiff's advantage, but he is unable legally to set foot on it. The Court place the decision on the ground that while necessity may serve as a basis for an implied grant or reservation, yet where, as here, there can be no question of grant or reservation necessity in itself cannot entitle to a way. In contradiction of this reasoning, the early English cases laid emphasis on the bad policy of tying up lands, and granted ways on the ground "that the public good required that the land should not be unoccupied." *Dutton* v. *Taylor*, 2 Lutw. 1487. Later this reasoning was doubted by Lord Kenyon in *Hawton* v. *Frearson*, 8 T. R. 50; and in *Bullard* v. *Harrison*,

4 Maule & S. 317, Lord Ellenborough held that, where no grant could be implied and where no prescription could be alleged, no degree of necessity could create an easement. The English law is settled in accordance with this case. In America the courts almost without exception have taken the same view. *Tracy* v. *Atherton*, 35 Vt. 52.

As a matter of principle, the accepted doctrine seems correct. It is harsh dealing to allow one person to impose such a burden upon an utter stranger for private advantage, and without compensation. It is hard to find a principle that will justly determine which of several surrounding landowners, all free from fault, must give gratis to the owner inside. The cases of grants implied from necessity can give no support to the contention against the principal case; for in these cases the way is not given because of the necessity in itself, but because the necessity has come to be considered proof that a way was intended to pass as incident to the original grant. The fact that the need of a way may suffice to show this intention is no ground for saying it will justify the appropriation of a stranger's land.

Again the reasons of policy set forth by *Dutton* v. *Taylor* are not so urgent practically as theoretically; as a matter of fact land will rarely remain tied up any length of time for want of a way. There are several remedies. The owner may sometimes, as he would have been allowed to do in this case, enter by license of the other landowner. He may often purchase a right of way. He may petition to have a highway laid out. He may finally be rid of the whole matter by selling out to the adjoining owners. To grant such ways would radically disturb private property rights, and the hardships and injustice incident to this disturbance would seem to outweigh the benefits. It may then be said both on principle and authority that what is generally termed a way of necessity is merely a necessary incident to a grant, that pure necessity in itself cannot authorize the appropriation of another's land, that the right to a way of necessity properly so called does not exist:—*Harvard Law Review.*

***

*Damages for mistakes in telegrams.*—The accepted rule as to the damages recoverable for the breach of a contract to transmit a telegram is boldly ignored in a late case. The plaintiff gave to the defendant, a telegraph company, for transmission to his attorneys, a message which read: "Attach property for seven hundred ninety dollars;" as delivered it read: "Even hundred ninety dollars." The attorneys attached for the latter amount, and thereby the remainder of the plaintiff's claim was

lost. The court assumed in their decision that the defendants are liable for the full amount of this loss. *Western U. T. Co.* v. *Beals*, 76 N. W. Rep. 903 (Neb.).

In the case of a negligent transmission of a telegram the courts have almost universally applied the general rule of *Hadley* v. *Baxendale*, 9 Exch. 341, which limits the consequential damages for a breach of contract to those within the contemplation of the parties at the time of entering into the agreement. So in every case the struggle at the trial is to show one of two things : either an actual notice, given by the sender to the operator, of the possibility of special damage, or a constructive notice given to him by the very words of the message. *Western U. T. Co.* v. *Landis*, 18 Ill. App. 57; *Squire* v. *Western U. T. Co.*, 98 Mass. 232. Upon the latter point there seem to be two lines of decisions, the first logically adhering to the rule and requiring the message to give the operator specific notice of the possibility of loss, the second holding it sufficient if the business importance of the message appears clearly. *Primrose* v. *Western U. T. Co.*, 154 U. S. I; *Postal T. Co.* v. *Lathrop*, 131 Ill. 575. In either case the remedy is notoriously inadequate. Accordingly, some few courts, not relying upon any principle but frankly recognizing the anomaly, have refused to apply the rule of *Hadley* v. *Baxendale*, *supra*; *Western U. T. Co.* v. *Way*, 83 Ala. 542; *Western U. T. Co.* v. *Reynolds*, 77 Va. 173.

This judicial legislation, and the numerous modern remedial statutes, lead one to question whether the law of damages has been properly applied to the case of the telegram. Damages flowing from a breach of contract are of two kinds,—direct and consequential. It is only in the case of consequential losses that the rule of *Hadley* v. *Baxendale* is law. But is not the damage in the case in hand direct ? The direct loss, as in all cases of breach of contract, is the value of the contract. The telegraph company has failed to deliver the information given to it; the value of the contract lost is, then, the value of the information transmitted. In an analogous case a common carrier without notice is held for the value of a package negligently lost. So in the principal case the court correctly assumes that the measure of damages is the difference between the sum attached for and the debt. A solution of all difficulties, then, would seem to be to recognize that the loss of the intelligence is a direct loss, and that the standard of damages is the inherent value of that information :—*Harvard Law Review.*

***

*Carriers—Throwing packages from moving trains.*—A news agent threw a package of papers from defendant's train while it was passing through a small station, and the package struck and injured the plaintiff. The news agent was not a servant of the defendant, but it was customary to throw packages from the train. *Held*, that a nonsuit is not error. *McGrath* v. *Eastern Ry. Co.*, 77 N. W. Rep. 136 (Minn.).

The plaintiff must show negligence on the part of the defendant; but, even if the act is not done by a servant of the company, the courts hold it liable if the act is done in accordance with a dangerous custom known to the company. *Galloway* v. *Chicago R. R. Co.*, 56 Minn. 346; *Snow* v. *Fitchburg R. R. Co.*, 136 Mass. 552. The court in the principal case directed a nonsuit, on the ground that there was no evidence of negligence, since the custom was not dangerous. In a similar case, however, where a company allowed its employés to throw sticks of wood off the train at their various homes along the line, a nonsuit in the lower court was held to be error. *Fletcher* v. *Baltimore & P. R. R. Co.*, 168 U. S. 135. There is very little authority on the point; but since it is purely a question of fact, it is hard to support the peremptory action taken by the court in the principal case, which seems very close to the line:—*Harvard Law Review*.

***

*Contract—Damages—Mistake in Transmission of Telegram.*—A message was given by the plaintiff to the defendants, a telegraph company, for transmission to his attorneys, which read: "Attach property for seven hundred ninety dollars;" as delivered it read: "Even hundred ninety dollars." The attorneys attached for the latter amount. In a suit for the loss caused thereby: *held*, that the defendants are liable for the remainder of the plaintiff's claim. *Western U. T. Co.* v. *Beals*, 76 N. W. Rep. 903 (Neb.):—*Harvard Law Review*.

***

*Contracts—Void conditions.*—A clause in an insurance policy provided that no action thereon should be sustainable at law unless brought within twelve months after the occurrence of the loss. *Held*, that it is against public policy to allow parties to fix a time within which an action may be brought different from that set in the Statute of Limitations. *Omaha Fire Ins. Co.* v. *Drennan*, 77 N. W. Rep. 67 (Neb.).

The same result has been previously reached in Nebraska. *Miller* v. *State Ins. Co.*, 54 Neb. 121. *Accord*, *French* v. *Lafayette Ins. Co.*, 5 McLean, 461. By the great weight of authority, however, the clause in

the principal case is held to be valid. 2 Wood, Fire Insurance, 2d ed., § 460. What consideration of policy or principle of law is offended by such a condition does not seem clear. The Statute of Limitations confers no new right of action but merely restricts the time, otherwise unlimited, within which an existing right may be asserted. It seems to be wholly within the spirit of this enactment, if not in actual furtherance of its design, that parties, in forming a contract, should still further limit the time allowed them for bringing actions thereon. Cf *Riddlesbarger* v. *Hartford Ins. Co.*, 7 Wall. 386. The holding in the principal case places an apparently unwarranted restriction on a person's freedom to contract :—*Harvard Law Review.*

***

*Criminal Law—Arson.*—A house was blown up with dynamite, and splinters were torn from the roof and fired by the explosion. *Held,* that this does not constitute arson. *Landers* v. *State,* 47 S. W. Rep. 1008 (Tex., Cr., App.).

The case raises a novel point. It is clear that the burning of parts of a house, already detached, is not arson. *Mulligan* v. *State,* 25 Tex. App. 199. In the principal case, however, the splinters were set on fire and detached simultaneously. The court, doubtless, reaches a sound result, for even if it could be said that the splinters were fired while at part of the house, still there was no burning of them in the sense of that term as used in connection with arson, till after they were detached. 2 Bish., Cr. L., § 10 :—*Harvard Law Review.*

***

*Property—Injunction—Common-law-Copyright.*—Complainant society filed a bill to enjoin defendants from using, as an advertisement of a medicine, extracts from a committee report read at a meeting of complainant society. By affidavits it appeared that persons were present at the meeting who were not members, but it did not appear that the meeting was open to the general public. On a motion for a preliminary injunction upon the affidavits; *held,* that publication of the report is not shown, and complainant is entitled to the relief asked. *New Jersey State Dental Society* v. *Denticura Co.*, 41 Atl. Rep. 672 (N. J., Ch.).

A common law right of property in an unpublished writing, whatever may be the theoretical objections to it, is generally recognised in this country. *Tompkins* v. *Halleck,* 133 Mass. 32. But *cf.* PARKE, B., in *Jefferys* v. *Boosey,* 4 H. L. Cas. 815, 919. Publication then is held to dedicate this property to the public. No such dedication is found in the

principal case, and the conclusion seems correct. Too much stress is perhaps laid on complainant's intention not to dedicate; no one who publishes a book intends to part with the work itself, as a piece of literary workmanship. Nor is the fiduciary position of the hearers of much importance as touching the mere fact of publication. The owner of the writing is the person to look at; what he did is the question. Under all the circumstances, the act of complainant society in the principal case hardly constitutes an abandonment to the public at large. See 12 *Harv. Law Rev.* 51:—*Harvard Law Review.*

***

*Quasi-contracts—Money paid for illegal purposes.*—The defendant falsely represented to the plaintiff that a criminal prosecution had been instituted against the latter, and obtained money from him to bribe the prosecuting officer to stop proceedings. *Held*, that the plaintiff can recover the money. *Smith* v. *Blachley*, 41 Atl. Rep. 619 (Pa.).

The decision seems correct. The plaintiff's illegal intention in giving the money to the defendant should not bar his recovery unless it is against public policy. The test applied by the courts in similar cases seems to be, whether recovery will give effect to the illegal transaction, or whether it will prevent its performance. Thus in the analogous case of money paid under an illegal contract, it is generally held that the money can be recovered at any time before the contract is performed. *Spring Co.* v. *Knowlton*, 103 U. S. 49; *Duval* v. *Wellman*, 124 N. Y. 156; *Taylor* v. *Bowers*, 1 Q. B. D. 300. But when the illegal transaction is partly or wholly performed, the courts will not allow either party to take advantage of its illegality; and therefore money paid under it cannot be recovered. *Kearley* v. *Thomson*, 24 Q. B. D. 742; *Tyler* v. *Carlisle*, 79 Me. 210. In the principal case the money had never been applied as the defendant represented, and since the plaintiff did not rely on any illegal contract, and the transaction was still unperformed, recovery was properly allowed. *Catts* v. *Phalen*, 2 How. 376:—*Harvard Law Review.*

***

*Trusts—Fraud by agent—Statute of frauds.*—Defendant orally agreed to act as agent for plaintiffs to purchase certain land in their name. He, however, had the conveyance made out to himself, paid for it with his own money and denied the agency. *Held*, that defendant is liable to plaintiffs as trustee *ex maleficio*. *Halsell* v. *Wise County Coal Co.*, 47 S. W. Rep. 1017 (Tex. Civ. App.).

There is much authority holding that the defendant is not liable on these facts, on the ground that the trust is created by the agreement of agency, and so is within the section of the Statute of Frauds requiring declarations of trusts in land to be in writing. *Burden* v. *Sheridan*, 36 Iowa, 125; *Nestal* v. *Schmid*, 29 N. J. Eq. 458. The result in the principal case seems more just and to be reached by sounder reasoning. Agency, though created by an agreement, is properly a relation or status, which, for a particular purpose, is fiduciary, and involves the devotion of the agent to his principal's interests. An abuse by the agent of this fiduciary relation is a fraud on his principal, and renders him liable for the proceeds of his wrongful act as a constructive trustee. This trust, then, really results by operation of law, and so is not within the Statute of Frauds. Browne, Statute of Frauds, § 96; *Winn* v. *Dillon*, 27 Miss. 494; *Jenkins* v. *Eldredge*, 3 Story, 181, 290:—*Harvard Law Review*.

## *Notes of American Cases.*

The rule that a drawee bank is bound to know the signature of its depositor is applied in *First Nat. Bank of Belmont* v. *First Nat. Bank of Barnessvie* (Ohio) 41 L. R. A, 584, with the effect of denying the right of a bank which has paid a forged check to obtain repayment from the party to which it paid the money.

***

The fact that a bank depositor procures a rubber stamp which will make a fac simile of his signature, while the bank has no notice of that fact, is held, in *Robb* v. *Pennsylvania Company for Insurance*. (Pa.) 41 L. R. A. 695, to be insufficient ground for charging him with the loss when the bank pays a check to which his name was forged by a clerk who clandestinely obtained and used the stamp for that purpose.

***

A woman who undertook to get on a mixed train at a distance from the depôt while the train was being made up, without any invitation to get on it at that place, is held, in *Jones* v. *New York Central & H. R. R. Co.* (N. Y.) 41 L. R. A. 490, to have no right of action for injuries sustained by the sudden jolting of the car as she was getting on.

***

An experienced traveller who steps out of a sleeping car and falls upon the track when he supposes he is entering the car closet, while

the train is passing through a tunnel and the car is dark, at about 6 o'clock in the morning, is held, in *Pipper* v. *New York Centra & H. R. R. Co.* (N. Y.) 41 L. R. A. 724, to be guilty of such negligence as will preclude his recovery even if the carrier is negligent.

***

An agreement by an attorney to prosecute a suit entirely at his own expense, in consideration of one half the recovery, is held, in *Johnson* v. *Van Wyck* (D. C.) 41 L. R. A. 520, to be void for champerty.

***

The question whether contributory negligence as a defense is to be determined by the law of the forum or the law of the place of injury is one of some novelty, but it is held, in *Louisville & N. R. Co.* v. *Whitlow* (Ky.) 41 L. R. A. 614, that the law of the place of injury governs.

***

A State constitution reducing the number of a grand jury and permitting conviction by less than a unanimous vote of the petit jury is held, in *State* v. *Caldwell* (La.) 41 L. R. A. 718, to be valid as applied to the prosecution of crimes previously committed, and not to be an ex post facto law, because the changes relate merely to the remedy.

***

A statute making it an offense to have possession of prohibited articles which are of no lawful use, such as a record of numbers drawn in a lottery, or of a lottery ticket, is held, in *Ford* v. *State* (Md.) 41 L. R. A. 551, to be constitutional, and ignorance of the character of the articles is held to constitute no defense.

***

The measure of damages for coal taken by a tenant in common without right, but in good faith, believing he had title, is held, in *Keys* v. *Pittsburg & W. Cool Co.* (Ohio) 41 L. R. A. 681, to be of the value of the coal in place at the time it was mined.

***

An electric passenger railroad on a country high way is held, in *Zehren* v. *Milwaukee Electric R. & L. Co.* (Wis.) 41 L. R. A. 575, to constitute an additional burden which requires the consent of the abutting owner and payment of compensation.

***

A Bible containing names and dates of birth of members of the family is held, in Supreme Council of the *Golden Star Fraternity Cenkinklin* (N. J.) 41 L. R. A. 449, to be inadmissible as evidence of the age of a person, when there is no proof when or by whom the entries were made, or of the writer's knowledge of the facts, or that the persons named therein had ever acknowledged the authenticity of the record.

***

The rule that a presumption of negligence does not arise from the fact of an injury is applied in *Benedick* v. *Petta* (Md.) 41 L. R. A. 478, where a person on a mimic railway was on a car when it entered a tunnel but was not on it when it emerged and was found unconscious in the tunnel, while other persons passed through safely, and there was no defect in, or abnormal condition affecting, the means of transportation.

***

The presumption against suicide is held, in *John* v. *Northwestern Mut. Rel. Asso.* (Wis.) 41 L. R. A. 587, insufficient to sustain a cause of action for accident insurance, where the insured went to bed as usual, was found next morning in an underground cistern back of the house, with underclothes, pants, and stockings on, but no coat, and the opening to the cistern was 15 by 20 inches.

***

Preference of usurious debts is held, in *Hiller* v. *Ellis* (Miss.) 41 L. R. A. 707, to make an assignment for the benefit of creditors void. This is a subject on which there are not many authorities, and these are not agreed, but their effect is shown in a note to this case.

***

Payments by the maker of a note are held, in *Maddox* v. *Duncan* (Mo.) 41 L. R. A. 581, ineffectual to interrupt the running of statute of limitations as to an indorser.

A partial payment by a principal debtor or his absence from the state is held, in *Mzoingo* v. *Ross* (Ind.) 41 L. R. A. 612, ineffectual to suspend or interrupt the statute of limitations in favor of his surety.

***

The theory that a landowner owes no duty of protection to a trespasser upon his land when the owner does not know of the trespass or in any manner induce it is denied in *O'Learg* v. *Brooks Elevator Co.* (N. D.) 41 L. R. A. 677, and, as he owes him no duty, it is held that he

cannot be liable for negligence toward him. This was a case of injury to a child by a dangerous shaft or tumbling rod running across a place where boys were sometimes accustomed to play.

***

The theory that the negligence of a parent or guardian can be imputed to an infant so as to preclude its right of action against a third person for negligence, which has been gradually repudiated in nearly all jurisdictions, is now repudiated also in Indiana, in the case of *Evansille* v. *Senhenn* (Ind.) 41 L. R. A. 728, which overrules prior decisions on the subject.

***

The ineligibility of a woman to be a notary public is decided in state, *ex rel. Monnett* v. *Adams* (Ohio) 41 L. R. A. 727, on the ground that the constitution requires every officer to be an elector and every elector to be a male citizen.

***

Liability of a partner for a penalty on account of the acts of a co-partner, done without his knowledge or consent, is denied in *Willams* v. *Hendricks* (Ala.) 41 L. R. A. 650, in a case as to a penalty for cutting trees. But the liability of an employer in a penalty for the acts of his employé is sustained in *Bryan* v. *Alder* (Wis.) 41 L. R. A. 658, where the penalty was imposed for refusal to serve a colored patron in an eating house. On the other hand, the employer's penal liability for an overcharge by a conductor, which was not authorized or approved by the employer, is denied in *Hall* v. *Norfold & W. R. Co.* (W. Va.) 41 L. R. A. 669. A question of great interest raised by these cases, as to the criminal and penal liability of a person for the act of his co-partner, servant, or agent is considered in an extensive note to these cases, reviewing the large number of decisions which touch the matter. The decisions are conflicting, but there are many which hold an employer liable to a penalty for acts of servants or agents which he has not authorized, if they are done in the scope of employment.

***

The suspension of a pupil because of a misconduct of the pupil's mother in entering the school room during school hours and using offensive or insulting language to the teacher is upheld in *Board of Education of Cartersville* v. *Purse* (Ga.) 41 L. R. A. 593, even if the child had not been guilty of any violation of the rules of the school. This decision is a novel one, but there are many cases concerning the suspension or expulsion of pupils which are presented in the annotation to this case.

***

The exaction of toll from a bicycle rider on a turnpike is held, in *Gloucester & S. Trup Co.* v. *Leppee* (N. J.) 41 L. R. A. 457, to be unathorized by a charter giving a right to toll for every carriage drawn by one or more beasts, and the right to stop any person driving any carriage of burden or pleasure who attempts to pass the gates without paying toll.

***

The use of the name of a place as a trademark for shoes which are not made there, in order to get the advantage of the repution of shoes made at that place, is held, in *Coelman, B. & W. Co.* v. *Dannenberg Co.* (Ga.) 41 L. R. A. 470, to be such a deception as would prevent the protection of such trademark by a court of equity.

***

Coercion of a jury for which a verdict will be avoided is held, in *People* v. *Sehldon* (N. Y.) 41 L. R. A. 644, to be shown when the jury agreed only after being out eighty-four hours, without beds or cots during forty of which they were confined in a small room, and had reason to believe, from the remarks of the court and the treatment given them, that a still longer confinement on chairs and benches was in store for them, while the judge also told them, on a report that they could not agree, that their failure to agree was "almost to confess incompetency."

***

Taking testimony away from the court room, at the house of the plaintiff, to which judge and juriors go for that purpose, against the defendant's objection, is held, in *Selleck* v. *Janaville* (Wis.) 41 L. R. A. 563, to be, at most, an irregularity which is not sufficient to deprive the court of jurisdiction or nullify the judgment. The decisions as to the validity of proceedings in the course of a trial outside the court room are not numerous, but those that have been made are presented in a note to this case.

***

Absence of a judge from the court room for about twenty minutes on a trial for felony, which goes on during his absence with a member of the bar presiding, is held, in *Ellerbee* v. *Staate* (Miss.) 41 L. R. A. 569, to amount to a dissolution of the court which makes the trail void. This decision is sustained by a considerable body of prior decisions on the subject, which are collected in the annotation to the case.

***

The unborn heirs of a person against whose estate an action is brought to establish claims, to which living heirs of the same class are made parties, are regarded, in *Horrison* v. *Turnbell* (Va.) 41 L. R. A. 703, as parties by representation and bound by the decree as effectually as if they had actually been parties to the action.

***

The right of passage on a navigable stream is held, in *Coyne* v. *Mississipi & R. River Boom Co.* (Minn.) 41 L. R. A. 494, to be a common and paramount right, which includes the right to float logs, if they are driven in an ordinarily careful and prudent manner, and in such case the party driving them is not liable for damages which may result to riparian owners. This decision is supported in the main by the other cases on the subject, which are collected in the annotation thereto.

The Madras Law Journal.

PART IV.] APRIL 1899. [VOL. IX.

# TOPICS OF MALABAR LAW.

## I.—*Joint Family.*

There is, perhaps, no district which contains such a miscellaneous collection of communities, that have not coalesced into a single body, as Malabar. Outsiders regard the District as full of mystery, and have no very definite conception of it or of the people that inhabit it. Even Judges are afraid to grapple with any question which arises for solution with regard to succession or the land-tenures of the District. With the single exception of Mr. H. Wigram, a distinguished Judge who presided over the District Court of South Malabar for a number of years, hardly one of the numerous writers who have treated of Malabar and of its usages, has attempted to make any scientific study of the rules that govern the various communities constituting the people of Malabar.

On the surface, the customs of the District appear to be very dissimilar to what obtain elsewhere, and exercise a strong fascination over those who visit Malabar. And this apparent dissimilarity has led to a notion that Malabar is a world by itself, and that Malabar Law is a body of usages and customs that have very little in common with the Hindu Law that prevails elsewhere in Southern India, although it is admitted that the inhabitants of Malabar are as much Hindus as people elsewhere and are in their religious and social life governed by the same Sastras that rule the Hindus of the East Coast. We propose to treat of certain important topics of Malabar Law and to show that, in so far as the law of the joint family life is concerned, the law of the Nayars and the law of the Nambudiries differ but very slightly from the Hindu Law according to the Mitakshara that governs the province of Madras generally except with regard to the rule of Partibility

of joint-family property. We shall attempt to point out that there is no justification for supposing that questions of Malabar Law are *sui generis*, bearing no analogy to the Mitakshara Law and incapable of being illuminated by the light that has long been thrown on questions arising under the Mitakshara Law. The variances, in fact, between the Mitakshara Law and Malabar Law will (on close examination) be traceable to a few fundamental differences which we shall indicate more clearly at once. The real difficulty, in Malabar Law is that it presents a considerable admixture of the rules obtaining amongst the communities that originally occupied Malabar and those that migrated to it from other countries. We must at the outset remember that of the people of Malabar a considerable fraction consists of emigrants from various other parts of Southern India. The indigenous inhabitants are supposed to be those governed by Marumakkattayam Law or the Law of Succession through nephews instead of sons. These are the Nayars or Sudras, and some other classes below them.

The Nambudiries or ancient Brahmins of Malabar, it is believed, are not really an indigenous sect, but emigrants of a very early date. According to the opinion of Justice *Muthusamy Iyer* in *Vasudevan* v. *Secretary of State for India,* they migrated to Malabar about 12 or 15 hundred years ago. (See I. L. R., 11 M. 181.) We have heard a tradition that their original place was on the banks of the Godavari in the Telugu country. A good deal may be urged in support of this tradition; but whether it is true or not is a matter of little importance for our purposes. The Nambudiries carried their law with them, that is, the law according to the Mitakshara as it was understood at the time of their migration. But in some respects they adopted the usages of the Marumakkattayam community and the law governing the Nambudiries is now, therefore, the Mitakshara law modified by some rules of the law which obtains amongst the Marumakkattayam Nayars. And in the persent day the law of the Nambudiries is as peculiar as Marumakkattayam law, and in many cases more difficult of ascertainment and definition. But the Nambudiries were only the first batch of immigrants. Various classes have from time to time migrated to Malabar from various parts of Southern India, and

in course of time they have in greater or less degree allowed their own personal law to be modified by the Marumakkattayam law of property and succession. And in cases arising between members of various communities it would be important to ascertain whether they were immigrants of a recent or early date in order to be able to decide what the law governing them is. We may at once mention that one large and important class of immigrants have remained absolutely untouched by the customs of Malabar, namely, the Tamilian Brahmins, sometimes known as Pattars, whose chief settlement at first was in the Taluq of Palghat. It will be unnecessary to speak of this class again in treating of questions connected with Malabar Law, as they in no way differ from the Tamilian Brahmins in other districts of the Presidency. But the Sudras and the other lower castes that immigrated to Malabar early have, as we have already indicated, scarcely remained untouched; and have, in many cases, become closely assimilated to the indigenous Sudras. But still it will be found that they have rarely adopted intact all the usages governing the Marumakkattayam Nayars; and especially have they shown disinclination to follow them in matters relating to marriage. It will, therefore, be found (what at first strikes a foreigner as curious) that while amongst the indigenous high class Marumakkattayam Sudras, there is absence of a legal marriage, such is not the case amongst several classes that are far below them in the social scale. In the case of many communities the chief difficulty is to find out what rules of their ancient personal law they retain, and wherein they have adopted the rules they found to obtain in the Marumakkatayam community that occupied the country of their adoption. We may mention amongst them the industrious and thriving community of Tiyas or Eluvas, whose home is by many supposed to have been the island of Ceylon. In South Malabar, the Tiyas generally retain their own law of succession in the line of sons modified to some extent by peculiar customs which are often due to the inferior development of the idea of peculiar or separate property and to the influence of the Marumakkattayam Law which obtains around them. In North Malabar, the Tiyas show far greater resemblance to the Marumakkattayam Nayars, and their law is the Marumakkattayam Law itself. And to us it seems a moot point whether the Tiyas of North Malabar were immigrants at all from foreign lands. In Travancore, and we

believe also in Cochin, the law governing Tiyas or Eluvans is a hybrid of Makkattayam and Marumakkatayam rules. We should also mention that the Marumakkattayam Law obtains not only amongst Hindus but also amongst Muhammadans in North Malabar. This is due to the fact that they were converts from Hinduism and did not change their law of property when they changed their religion. While, therefore, the religion of Mahomet and the ordinances of his followers governed their religious and social life, it is strangely intermingled with the rules of property and of succession that govern the Nayars. Their rules of marriage are exactly identical with those that govern other Muhammadans; but their rules of property are regulated according to Marumakkattayam Law. Sometimes we find that the rules of Muhammadan law modify those of Marumakkattayam Law, especially with regard to self-acquired property. And we shall find certain curious problems arising out of the admixture of these two diverse elements. But we shall not stop to examine them now. With these preliminary observations we shall proceed to consider the nature of the joint-family in Malabar; and in treating of this question as of other questions hereafter, we shall deal separately with the Marumakkattayam Law of the Nayars and the Makkattayam Law of the Nambudiries. The law of those Tiyas and Muhammadans who are governed by Marumakkattayam Law being identical with that governing the Nayars generally, it will not be necessary to notice them separately.

The joint-family in a Marumakkatayam Nayar Tarwad consists of a mother and her male and female children, and the children of her female children, and so on. The issue of male children do not belong to their Tarwad, but to the Tarwad of their consorts. The property belonging to the Tarwad is the property of all the males and females that compose it. Everybody has equal rights, whether male or female. Supposing there are three daughters with an unequal number of children each, the children by one daughter cannot, as a body, claim an equality of rights with the children of another daughter. In fact, the family consists of individuals with equal rights and does not recognise any rights in branches as such. Supposing a division takes place with the consent of all, everybody, whether male or female, adult or infant, would be entitled to an equal share. A Tarwad, no doubt, is said to consist of so many

Tavalis, *i.e.*, lines of mothers, and when a division takes place, it is generally split up according to Tavalis; that is, those descended from the same mother, or it may be from the same grandmother, while separating themselves from the Tarwad as a whole form themselves into a new Tarwad instead of living separately as individuals. But this is only for convenience' sake, and it is not the fact that children by one mother are given as much as children by those of any of her sisters, irrespective of the number of children that each has. Division in other words is made, not *per stirpes*, but *per capita*. Nor is it always the case that the children of one mother or the members of one Tavali cling together after a division. Sometimes members of different Tavalis remain together undivided after division while some members of a Tavali prefer to be separated from the other members of it. The question whether every individual has equal rights, however, has never been definitely decided judicially. Inasmuch as the Courts have laid down that there can be no division in a Marumakkattayam Tarwad, except with the consent of all the members, the question has not arisen directly for decision. The extent of the shares of the individual has, of course, to be determined by mutual consent, inasmuch as otherwise there could be no division at all. But suppose there are minors in a family, and the adult members acting together on behalf of themselves and the minors divide the properties, the question would then arise 'in what manner they should effect a division, so that it may be binding on the minors too?' We have no doubt that division is usually made *per capita*, though the Tarwad is separated according to the Tavalis, *i.e.*, after the division, it is generally the members of the same Tavali that continue to live together as members of one Tarwad. It seems to stand to reason that every member should have an equal right. For suppose the common ancestor had one daughter and five sons, and the daughter has a number of children, some of whom are daughters, and the females amongst these latter again have a number of children each, what would be the effect of effecting a division *per stirpes*? The five sons of the common ancestor would be entitled to five-sixth of the property, with power each to alienate it as he pleases, and only a sixth of the family property would remain available for division amongst those who continue the Tarwad. And if the males amongst the children of the daughter again each take away as much as each of their

sisters with their children with powers to alienate it, only a very small fraction indeed of the property would descend to those who can continue the Tarwad. This is probably the reason why the understanding amongst the people always has been that every individual born in the Tarwad has an equal right with every other individual.

Mr. Wigram says (see page 6 of his Malabar Law and Custom) that in 1810 the Provincial Court of the Western Division held that "if partition was made, it must be *per stirpes* and not *per capita.*" Mr. Strange in his Manual of Hindu Law, page 389, observes that division would be according to Tavalis or branches of the family, that is, the property would be primarily divided among the sisters of the common ancestor, these giving rise to branches, and afterwards among their progeny. Mr. Strange does not mention brothers. Should they not get as much as the sisters, or what are their rights? Mr. Strange himself in speaking of the necessity of the consent of the Anandravans to validate a sale of Tarwad property says: "That the reason of the rule is that all the Anandravans are held to have a common interest in the family possessions." See page 67 of Wigram's Commentary. Mr. Holloway, as Sub-Judge, speaking on the same subject, observed thus: "The principle upon which restriction is placed upon the right of a Jenmi to *dispose* is that, in fact, the law regards all the descendants of the common ancestor in the female line as joint-tenants of the property whose assent must be procured to the alienation of the property." Here, Mr. Holloway is, of course, speaking of the males also, because the rule has been supposed to be that the consent of the male Anandravans also should be taken before a sale is made. See *Edathil Itti* v. *Kopashan Nayar*, 1 *M. H. C.*, 222; *Kondi Menon* v. *Sranginreagatta Ahammada, Ib.* 248; *Kaipreta Ramen* v. *Makkaiyil Mutoren, Ib.* 359; *Koran Nair* v. *Chandu Nayar*, 3. *M. H. C. R.* 294; *Kunhamod Hajee* v. *Kuttiath Hajee*, I. L. R., 3. M. 170; *Krishnan* v. *Appu*, 6 Travancore Law Reports, p. 49. We are not aware that the High Court has ever laid down the law in the way that the Provincial Court or Mr. Strange understand it.

In *Subbu Heggady* v. *Thongu An Aliyasantana Case*, 4 M. H. C. R. 196 at page 201, the Madras High Court observes that "the legal right to the family property is vested in the female members

of the family jointly but for little other practical purpose than regulating the course of succession." This observation is based upon a text of Bhutala Pandia, a now discredited work, and is intended only to show that no single female member has a right to live apart from the family and claim a separate allowance for maintenance from the income of the family property. The question whether males have an equal right of ownership with females did not arise, and we do not think that the Court intended in any way to negative the right of males to an equal right of ownership with females. Anyhow, the remark founded, as it is on Bhutala Pandya, is not applicable to Malabar. The position of women has been sometimes supposed to be somewhat higher than that of males in the Aliyasantana system, though in our opinion it refers only to their being the perpetuators of the line, and does not indicate any higher rights of ownership in them than in their uncles or brothers who constitute the male members of the family.

In *Todd* v. *P. P. Kunhamod Haju*, I. L. R. 3, M. 174, the Madras High Court (*Turner*, C. J., and *Muthusamy Iyer*, J.) say: "The law governing the property of a Tarwad has not reached the same stage of development as the law regulating the joint property of the Hindu family. Not only in the former case is succession traced to females, but the properties is indissoluble; so that the members of the family may be said to have rather rights out of the family than rights to the family. . . . The family and not the individual is what we term the social unit. . . . The individual right of the members of the Tarwad is so feeble that it is not competent to any one of them to insist on a partition. The males take interests in the Tarwad property which endure only for their lives, but do not pass to their offspring, nor available for their private debts." The learned Judges are evidently of opinion that males like females are owners and the interests of both are only for their lives. The difference between the two is that while the children of the females become co-owners by birth, the children of the males being members of different Tarwads derive no interest in the property of their fathers.

Dr. Ormsby in his Outlines of Murumakkattayam Law as administered by the High Court of Travancore says (see page 2): "That where a division takes place, it will usually be according to

Tavalis or number of females of the original ancestor, each Tavali may similarly be sub-divided should the members consent thereto, and so on, until individual proprietorship is arrived at." The learned author says: "I am not aware if this rule has ever been questioned." He does not cite, however, any authority for his position, and we are not in a position to say whether he is not merely accepting Mr. Strange's proposition as laying down correctly the law on the subject.

He observes (see page 2 of the introduction): "The descent is to nephews, that is, a man's heirs are not his sons, his grandchildren, &c., his father, his father's son's, &c., but his sisters, sister's daughters, mothers' daughters' daughters, mother, mother's sisters, and so on, male descendants of these being entitled to maintenance and to management of family possessions, but not, strictly speaking, being entitled to inherit." It will be observed that while the author begins with saying that the descent is to nephews, he really excludes nephews and all other males from inheritance, and says they are entitled only to maintenance. We fail to see what authority there is for the exclusion of males, or on what reasoning the author would support it. See *Varnakode Narayan Nambudri* v. *Varnakode Narayan Nambudri*, I. L. R., 2 M., 329. It is conceded that the right of management is in the males, and so long as there is any male of adult age, no female, however old, is entitled to manage. Whence this right of management, if they are not co-owners along with the female members of the property they are entitled to manage? A mere right to maintenance cannot give a right to manage as against those who are owners. It will be remembered that the right to manage is one which the senior male cannot be deprived of, except for grave mismanagement or gross incompetence and by decree of Court. Now, can such a right be traced to a right to maintenance? We do not rest the equal ownership of males on their right to manage. We are aware that until recently, at any rate, the right to manage or *ejamanship* was believed to be vested in the senior female amongst the followers of the Aliyasantana or Marumakkattayam system in S. Canara; and in the Kovilagoms of the Zamorin's family in S. Malabar and of some other families, the management is vested in senior females. The right of ownership does not necessarily give a right to management. Females though they admittedly

have the right of ownership in the Tarwad property are excluded from management while there are adult males on account of their inferior capacity to manage. But we think that the existence of the right to manage is a strong argument in favour of the right of ownership. It has been held both by the Madras and Travancore High Courts that the last member of a Tarwad, whether male or female, has power to alienate the Tarwad property, (*Alami* v. *Komu*, I. L. R., 12 M., 126; *Narayani* v. *Sirkar*, 1 Travancore Law Reports, p. 92). The only basis for the view that males have no right of ownership is that they do not become a stock of descent as their children do not belong to their Tarwad. But this, in our opinion, is no reason for concluding that the males are not co-owners with females, and such a view is altogether opposed to the accepted notions of ownership among the followers of the Marumakkattayam system.

Mr. Grady also seems of the same opinion, Hindu Law, p. 310. It will be observed that he, like Mr. Strange, takes no note of the sons, but says that division will take place according to the number of daughters. With all respect to Mr. Strange and Dr. Ormsby, we cannot help saying that their view is not in accordance with the accepted conceptions of the community to whom the law applies and according to which division is ordinarily carried on by them. And we also think that in the interests of the Tarwad, the safer rule to lay down is, every one, male or female, has an equal share in the property.

It has now been taken as fairly established both in the Native States of Travancore and Cochin and in British Courts that no member of a Marumakkattayam Tarwad can claim division as a matter of right, and every member can resist partition if he does not like it. In other words the unanimous vote of the members is necessary to effect a partition. See Ormsby's Outlines of Marumakkattayam law, page 1; Wigram, pp. 6 and 7. It seems to us to be doubtful whether the rule in its strict form is not really due to the British Courts. It seems extremely unlikely that a single member should have been given the right to resist the will of the majority of the Tarwad to resist a partition. Where there is a general consensus of opinion among members that division would be expedient or beneficent, a division was, we think, generally

allowed, notwithstanding the dissent of a small minority. Mr. Wigram refers (see page 6) to a case decided in 1810, in which the individual share of a member of a Marumakkattayam family was held liable to be sold for debts contracted by him. This necessarily presupposes the right in the purchaser to enforce his right by a division of the property so as to separate the share belonging to his judgment-debtor. He refers also to an opinion given by Sudder Court Pandits in 1854 that where a junior member of a Nambudri family marries, he may enforce a division of the family property.

It seems to us that the English Judges after the establishment of the British Courts conceiving that a non-division is the logical consequence of a system of law "which vests the property in the females of a family" rigidly enforced the rule of impartibility contrary to the common practice among the people. In *Munda Chetty* v. *Thimmaju Hensu,* 1 M. H. C. 380 at p. 383, which was a case under the Aliyasantana system, Mr. Justice *Holloway* observed as follows:—

"It has not been disputed, as indeed it could not be, that the compulsory division of the family property is wholly opposed to the authorities on which the Aliyasantana system of inheritance rests." The reference is to Bhutala Pandya's Kuttu whose authority has been now considerably shaken, and it has no application to Malabar. "It is equally opposed to the principle of that system which vests the property in the females of the family. . . . If this indisputable rule has been abrogated by the decision of the highest Court of Appeal upon the question distinctly raised before it, however much I should have lamented that Judges have overstepped their proper duty of declaring law, I should as in the case of Hindu wills have followed them. Here, however, the only decisions produced are those of inferior Courts influenced by their views of expediency with particular cases before them, and still more singularly decisions in which while violating the law, those Courts have admitted its existence. Decisions dividing family property have also been passed in Malabar. And it is one of the claims of our late colleague, Mr. Justice *Strange,* upon that respect which we all feel for him, that he successfully resisted the attempts of Lower Courts, also acting upon their views of expediency to introduce foreign admixtures into a law, of which whatever may be thought of its

policy, none can deny the consistency with the theory upon which it is based."

The above quotation indicates the spirit in which the law was laid down by the learned Judge. He took it that succession through females involves impartibility of the property, and was resolved to prevent foreign admixtures into the system. It may be noted that in the case referred to, that both the District Munsif and the Sudder Ameen who were probably gentlemen acquainted with the practice among the followers of the Aliyasantana law, had allowed division; and on remand, the Civil Judge observed that division of family property had been allowed in numerous suits since the year 1825, and submitted those decrees for the information of the High Court. We suspect that as pointed out by *Holloway*, J., division was equally common in Malabar; we do not see that non-divisibility follows logically from succession through females. And if it did, the question would still be not what would make the system logically perfect, but what were the usages amongst the communities who are governed by it. Before the British Courts, the Native Rajahs or the local Panchayets used to decide all the disputes. It is extremely unlikely that they would have allowed a single factious member to insist on the Tarwad remaining joint in opposition to the general will of the Tarwad. And as a rule, the majority of the members might enter into a family Karar and lay down rules for the management of the family property. It seems to us that this is one of those cases where the beneficial growth of the customary law was arrested by courts that were not altogether well-informed as to conditions of the society to which the law applied. The law of property amongst the followers of Marumakkattayam is based completely on usage, and it would have been well if the British exponents of that law had allowed more weight to the views of the people than to their notions of a perfect system of Marumakkattayam law which is nowhere expounded in writing. This is the more to be regretted as experience is making it manifest every day that compulsory non-division by no means helps the economical or social progress of a people. But, we must admit that so far as Malabar is concerned the law of impartibility has been laid down by the highest court ever since the year 1814 (See 1 S. D. 118), and this is the view upon which the Marumakkattayam people

have acted for a long time. There has been no express decision during recent years on the question. But this is no doubt due to the fact that no one has thought it worth while raising the question and the people have acquiesced in the law as laid down by the courts. We are afraid that it is now too late for the courts to go back, although, perhaps, reasons may be adduced for holding that the law of *Stare decis* is not applicable to a case of this kind.

Notwithstanding a division it is open to the members who have divided to re-unite and live together again as members of an undivided family. The rights of the members after such reunion would, we believe, be precisely the same as they were before division. Where divided members throw their property together and live in commensality, the presumption will be that they have reunited to form an undivided Tarwad again in the absence of circumstances to show that they intended merely to become tenants-in-common. The result will be, we think, that they cannot divide again except with the unanimous assent of all. Sometimes Tavalis that were never undivided within their memory may unite together and form an undivided Tarwad. We believe that persons who are not descended from a common ancestor, who belong to different Tarwads and who have no *attaladakkam* rights whatever cannot unite so as to form a single Tarwad with the rights and disabilities attaching to such a combination. This would be exactly the same as if individuals governed by Mitakshara law try to form a joint Hindu family by living together. Such a combination would be similar to a partnership and the members would be at liberty to put an end to it at any time they please. In a recent case from North Malabar (S. A. 1372 of 1897) it was contended that the children of a Nayar by different consorts belonging to different Tarwads were living together as one Tarwad, and that, therefore, the rights and disabilities of the position of an undivided member of a Tarwad would attach to them. The Court (*Davies* and *Benson*, J. J.) sent down for trial an issue whether there was any usage allowing the formation of a Tarwad in this manner. The point was not ultimately decided by the court as the parties compromised the dispute after the remand. We think there will be no doubt that descent from at least a common female ancestor is essential to the

construction of a Tarwad. The combination of individuals unconnected by any such relationship would be absolutely illegal, and we have no doubt unwarranted by any usage.

---

## BANDHUS—III.

We shall now see how far judicial decisions have recognised the persons comprised in our tables. Of course, it can scarcely be expected that the judicial dicta should give us any definite and universal principle to guide us in finding out the persons comprised in the term *bandhus*. In our resume of the authorities, our more immediate concern is to see whether the decisions conflict with the principles we have already set forth, as underlying the law of succession among *bandhus*.

In *Ratna Subba Chetty* v. *Ponnappa Chetty*, I. L. R., 5 M., 69, the respondent, Ponnappa Chetty, sued to recover certain property as heir of one Subbaraya Chetty, deceased, as being the grandson of the maternal uncle of Subbaraya Chetty's mother.

Their Lordships, *Turner*, C.J., and *Muttusami Aiyar*, J., held that Ponnappa was a *bandhu*, and as such entitled to succeed. After holding that the Mitakshara list was not exhaustive but merely illustrative, their Lordships observed: "The author of the Mitak-"shara, chapter II, section 5, § 3, declares that *kinsmen sprung* "*from a different* family but connected by funeral oblations (1) are "indicated by the term cognate, *Bhinna gotra sapindanam bandhu* "*sabda grahanat;* and in section 6 that cognates (*bandhus*) are of "three kinds,—related to the person himself, to his father or to his "mother. The great-grandson of the mother's maternal grand-"father is a *sapinda* of that common ancestor, and, therefore, a "cognate related to the mother, *matri bandhu.* The mother's "maternal uncle, though less remote, succeeds in virtue of a similar "affinity." This decision recognizes the three different classes of *bandhus* and also the mode of computation of degrees. For it says, if the claimant is the *sapinda* of the common ancestor, who him-

(1) This is erroneous; it must be 'connected by particles of the (same body)'.

self is the *sapinda* of the propositus, then heritable right exists. The common ancestor need alone be reached. This is the mode of computation peculiar to Hindu Law.

In *Krishnayya* v. *Pichamma*, I. L. R., 11 M., 187., their Lordships, *Collins*, C. J., and *Muttusami Aiyar*, J., held that the *daughter's son's son* of the deceased (*viz.*, the daughter's grandson) is a *bandhu*. The reasoning upon which this decision proceeds, though in some respects faulty as will be presently noticed, affirms the proposition that where a remoter person is a *sapinda*, his ancestor through whom he must trace the relationship must necessarily be also a *sapinda*. It also substantially affirms the theory of mutuality of *sapindaship*. For their Lordships observed: "The father's maternal uncle and "his son are the father's cognates, because the father's maternal "grandfather is the person to whom they and the father offer "funeral oblations, and though they belong to different families, "they are, on that ground, *bhinna-gotra sapindas*. It follows, "then, that the father's maternal grandfather, who is nearer to "the father than his maternal uncle, is a *bhinna-gotra sapinda* "or *bandhu* as explained in Mitakshara, chapter II., section V, § 4." There can be no doubt that the decision is correct. But the reasoning of the learned Judges does not appear to be sound as it ignores the principles of Mitakshara. The computation of degrees in Mitakshara is based, not upon the theory of offering funeral oblations, but upon the theory of affinity or consanguinity. The father, the father's maternal grandfather, the father's maternal uncle and his son are connected with each other, not because the father, his maternal uncle and his maternal uncle's son offer funeral oblations to the father's maternal grandfather, but because they are connected by blood within the meaning of the texts of the Mitakshara. That the Mitakshara has ascribed to the word "*sapinda*" a different meaning to that given to the same word by the author of the Dayabhaga cannot now be gainsaid as I have already pointed out *Lakshmanammal* v. *Tiruvengada Mudaliar*, (I. L. R., 5 M., p. 241 at pp. 247 248, following I. L. R., 6 C., 119, and I. L. R., 2 B., 423, and other cases already cited in my former article). Of course, it may be that the person who is connected by consanguinity or affinity may also offer funeral oblations, but the offering of the funeral oblations is not the test of heredity under the Mitakshara law and does not involve a mutuality of succession.

In *Sethurama* v. *Ponnammal*, I. L. R., 12 M., 155, their Lordships, *Collins*, C. J., and *Shephard*, J., held that the *paternal great-grandfather's daughter's son's son* of the deceased is a *bandhu*.

The Court observed: "Deceased Karpora is the great-grandson "in the male line of the common ancestor Namasivaya, while the "appellant is the daughter's grandson (son's son) of the same person. "The Subordinate Judge has held that standing in this relation to "the deceased, he is not his *bandhu*. We are of opinion that the "appellant, being within seven degrees of the deceased on his "father's side, was his *sapinda*. He does not belong to the same "*gotra*, because a female intervenes, *viz.*, the appellant's grandmother, "but he is what is called a *bhinnagotra sapinda* or *bandhu*. It is "now clearly established that the assumption (that the Mitakshara "list is exhaustive) is erroneous, and that if any one comes within "the definition of *bandhu*, though not specially named, he is entitled "to succeed as such." There is a general observation that seven degrees ought to be computed on the father's side. But this, as I have already observed, will not universally be true. If we were to apply it generally, the seventh ancestor's daughter's son will be an heir. This could not be; for the seventh ancestor's daughter's son will not be the *sapinda* of the propositus, as I have already pointed out, although the propositus may be the *sapinda* of the seventh ancestor's daughter's son. This violates the rule of mutual *sapindaship*, which is the governing feature of the Mitakshara law of succession.

We may take it, however, that their Lordships did not address themselves to a decisive consideration of the question, *viz.*, within what limits are the heritable *bandhus* to be found. The decision in the particular case is, no doubt, correct, for the claimant there is an undoubted *bandhu*.

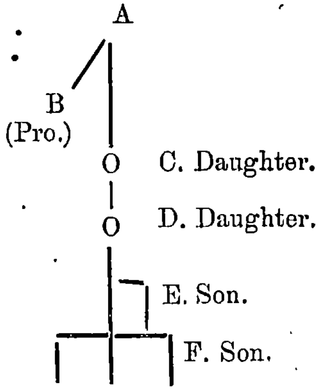
In *Umaid Bahadur* v. *Udoi Chand*, I. L. R., 6 C., 119, a Full Bench of the Calcutta High Court held that a *sister's daughter's son* is a *bandhu*, and as such entitled to succeed.

Their Lordships observed:—

"The defendant in this case is a descendant three degrees "removed from Mukhtab Bahadur's father, the common ancestor;

"Mukhtab Bahadur, is the son of the maternal grandfather of the "defendant's mother. Therefore, they are related as '*sapindas*' to "each other. The defendant is a '*sapinda*' of Mukhtab Bahadur, "because he is within six degrees from the common ancestor, *viz.*, "Mukhtab Bahadur's father; and Mukhtab Bahadur, of the defendant, "because he is the son of the defendant's mother's maternal grand-"father. In order to determine whether a person is a *sapinda* of the "propositus within the meaning of the definition, it is necessary "to see whether they are related as *sapindas* to each other, "*either directly through themselves or through their mothers and* "*fathers.*

"Take for example the following table for illustration :—




"A. is the common ancestor; B., his son, is the propositus; C., a daughter of A.; D., her daughter, both dead; E. is the son of D., "and has a son F.

"Now B. and E. are *sapindas* to each other, but not B. and "F. Although F. is within six degrees from the common an-"cestor, yet B, not being a descendant of the line of the maternal "grandfather, either of F., or of his father and mother, they are "not *sapindas* to each other; but B., being a *sapinda* of E., "through his mother, they are *sapindas* of each other. The defen-"dant stands in the same relationship to Mukhtab Bahadur as E. "does to B. Therefore, the question referred to us (whether the "defendant is a *sapinda* of the deceased) should be answered in "the affirmative."

We cannot understand the exact meaning and the force of the passage—'*directly through themselves, their fathers or mothers*' (the *italics* in the above quotation are ours). In one sense (and this is the only sense we know of) it is always the case that *sapindaship* is traced through oneself or through the father or mother. *Sapindaship* is traced through oneself when the given person is a descendant. It is traced through the father and mother when the given person is either a descendant of the father or the maternal grandfather, etc., and their ancestors. There is no such thing as indirect relationship through oneself, one's father and mother. There is no warrant for saying that one should be a descendant of the line of the maternal grandfather either of the propositus or of his father or of his mother. This is due to a mistaken notion that the Mitakshara only introduces these three foreign families. I have already pointed out the error underlying this notion. B. is the son of the mother's maternal grandfather of the father of F. The mother's maternal grandfather's son is a *matri bandhu* and the father's mother's maternal grandfather's son is the father's *matri bandhu*, and is, therefore, a *pitri bandhu* to the deceased. B. and F. are therefore mutual *sapindas*.

In *Babu Lal* v. *Nanku Ram and another*, I. L. R., 22 C., 339, the Calcutta High Court (*Norris* and *Bannerjee*, J. J.) held that *the mother's mother's father's son's daughter's sons* of the propositus were entitled to succeed as *bandhu*. Their Lordships after pointing out the mistake which Mr. Colebrooke fell into, when he rendered the word '*sapinda*' as a 'person connected by funeral oblation', observed:

"The plaintiffs are *bhinnagotras* of Ram Saran (propositus), " *i.e.*, they are sprung from a *gotra* or family different from his.

" The question is: whether they are heritable *sapindas?* Now " the term '*sapinda*' is explained in an earlier part of the Mitak-" shara in the section relating to marriage, when commenting on " verses 52 and 53 of Chapter I of Yajnavalkya's institutes (See " 6 C., 119).

"According to that explanation or definition a *sapinda* of a "man means and includes—

"(1) any descendant within the 7th degree reckoned from and "inclusive of himself, *i.e.*, any of his first six descendants;*

"(2) any ascendant within the 7th degree reckoned from and "inclusive of himself in his paternal line;*

"(3) any collateral descendant within the 7th degree reckoned "from and inclusive of any of the six paternal ascendants, *i.e.*, any "of the first six descendants of any of the first six ascendants in the "paternal line;

"(4) any ascendants within the 5th degree reckoned from and "inclusive of himself in the maternal line, *i.e.*, any of the 4 maternal "ancestors, *viz.*, the mother, her father, her grandfather and the "rest;

"(5) any collateral descendant within the 5th degree from and "inclusive of any of the 3 maternal ancestors, beginning with the "mother's father, *i.e.*, any of the first four descendants of any of "3 maternal ancestors, beginning with the mother's father. The "mother's descendants are not here included as they, being ordi- "narily also the descendants of the father, are included among "collaterals on the paternal side."

Here is some attempt at a generalisation, and we have been therefore tempted to quote passages from the judgment rather *in extenso*. But it has the fault both of improper inclusion as well as of omission. It has the further fault of vagueness. For instance, as was pointed out in the note below it includes many descendants who would clearly not be in the line of heirs at all. No reference is made to the mother's mother's family. It may be doubted whether that by the term 'paternal ascendants' their Lordships intended to include any beyond the agnatic ascendants. At any rate as regards the mother's mother's family (even assuming the term

* This is very broadly stated. It is true of all male agnates. Of course, by the rule of mutuality of *sapindaship* recognized by their Lordships in a subsequent passage, only certain of these will succeed. When the descendant traces through a daughter of the propositus or his 6 ascendants, this rule will not, as already observed, hold good, nor does the rule universally hold good where a female ancestor intervenes.

'maternal line' is meant to include both the mother's paternal and maternal lines), the collateral descendants are not referred to at all. (See rule 5 in the above quotation). Further, it does not say what the lines are we have to take and what foreign families have to be taken.

After laying down the rule of mutual *sapindaship,* their Lordships proceed to apply the rules they enunciated to the particular case and say: "We find that plaintiffs are descended "in the 3rd degree from Mangru Ram, who was Ram Saran's "mother's maternal grandfather, and so they are Ram Saran's "*sapindas* through his *mother.* We also find that Ram Saran was "the 3rd in descent from Mangru Ram, who was the plaintiff's "maternal great-grandfather, and so he was their *sapinda directly.* "Thus we find that the plaintiffs and Ram Saran are mutually "related as *sapindas,* the former through the mother and the latter "directly. The plaintiffs are therefore *sapindas* and *bandhus* of "Ram Saran, *ex parte* materna, and are his heirs." We cannot understand why in the case where *one's mother's paternal grandfather* intervenes, there should be *sapindaship directly,* and why where the *mother's maternal grandfather* intervenes, there should be *sapindaship through the mother.* In both cases *sapindaship* is through the mother, and both are *matri bandhus* according to the Mitakshara. The distinction is unsound and is not warranted by the authorities.

In *Parot Bapa Lal Sevakram* v. *Mehta Harilal Surajram,* I. L. R., 19 B., 631, *Bayley,* Ag. C. J., and *Fulton,* J., held the father's sister's daughter's son is a *bandhu* and is entitled to succeed. Their Lordships observed: "In regard to the succession of cognates there seems no difference in the rules laid down in the Mayukha, which, as pointed out in *Lallubhai* v. *Mankuverbai* (I.L.R., 2 B., 388), has on most questions of inheritance adopted the principles of the Mitakshara. . . . . . . The remarks of *West* and *Buhler* at p. 498 appear to question the correctness of the decision in *Umaid Bahadur* v. *Udoi Chand,* I. L. R., 6 C. 119, that the intervention of two females in the line of descent is no bar to inheritance, for, as stated by Mr. Mayne in his note to S. 472 of the 4th Edition of his Treatise, the principle that succession under Mitakshara Law depends upon propinquity and not upon religious

efficacy has been settled by distinct rulings, (see *Lallubhai* v. *Mankavarbai*, I. L. R., 2 B., 388; 7 I. A., p. 212; *Nallanna* v. *Ponnal*, *Ib.* 14 M. 149; *Ramappa Udayan* v. *Arumugath Udayan*, *Ib.* 17 M., 182). Accepting this principle we can see no ground for rejecting the claim of the plaintiff who is within four degrees of the common ancestor who was the maternal grandfather of the plaintiff's mother."

The claims of the sister's son have been recognized in *Amrita* v. *Lakhinarayan*, 2. B. L. R. (F. B.), p. 28; *Chelikani Tirupati* v. *Rajah Surneni*, 6. M. H. C., p. 278; *Gunesh Chuuder Roy* v. *Nil Komul Roy*, 22 W. R. 264; *Naraini Kuar* v. *Chandi Din*, 9, A. 467; *Lakshmanammal* v. *Tiruvengada Mudali*, I. L. R., 5 M., 241. In *Subbaraya* v. *Kylasa*, I. L. R., 15 M., 300, the step-sister's son's claims have been recognized.

The maternal uncle's claims are upheld in 12. M. I. A., p. 448; *Mohan Das* v. *Krishna Bai*, I. L. R., 5 B., p. 597; *Narsimma* v. *Mangammal*, I.L.R., 13. M., 10. A maternal uncle by the half-blood is given a decree in *Muthusami* v. *Muthukumarasami*, *Ib.* 16 M., 23. S. C., on appeal to the Privy Council; *Muthusami Mudalliar* v. *Sunambedu Muthukumarasami Mudaliar*, 23 I. A., 83. The father's maternal uncle is given a decree in *Giridhari Lall Roy* v. *Bengal Government*, 12 M. I. A., 448. The claims of the maternal grandfather are upheld in *Chinnammal* v. *Venkatachala*, *Ib.* 15 M., 421.

The claims of the sons of sons of daughters born in the family were upheld in the following cases :—*Sheobarat Kuari* v. *Bhagwati Prasad*, I. L. R., 17 A., 523 (Propositus); *Krishnayya* v. *Pichamma*, *Ib.* 11 M. 187, *Sethurama* v. *Ponnammal*, *Ib.* 12 M., 155 (great-grand-father's).

The claims of the sons of daughters of sons born in the family were upheld in the following cases :—*Mussamut Doorga Bibee* v. *Janaki Pershad*, 18 W. R., 331 (father's); *Sundrammal* v. *Rangasami Mudaliar*, I. L. R., 18. M., 193 (grandfather's).

The claims of the sons of daughters of daughters born in the family are upheld in the following cases :—I.L.R., 6 C., 119 (F. B.'s (father's); *Ib.* 19 B., 631 (grandfather's); *Babu Lal* v. *Nanku Ram*, I L.R., 22 C., 339 (mother's maternal grandfather's).

The claims of the sons of daughters of sons of sons born in the family are considered in *Manik Chand* v. *Jagat Settani*, I. L. R., 17 C., 518.

In *Ananda Bibee* v. *Nownit Lal*, I. L. R., 9 C. at p. 327, the right of a great-grandson of the maternal grandfather of the father of the propositus is recognized.

We shall now consider the order of succession. We are in a position here to formulate the same under the following rules :—

I. The *atma bandhus* take first; then *pitri bandhus;* then *matri bandhus.*

There is express authority for this in the Mitakshara itself. For the author in chapter II, section 6, placitum 3 says: "Here by reason of near affinity, the cognate kindred of the deceased himself are his successors in the first instance; on failure of them his father's cognate kindred, or, if there be none, his mother's cognate kindred. This must be understood to be the order of succession here intended." This is approved by all the other commentators, and we have further the decision of the Judicial Committee in *E. C., Muttusami Mudalliar* v. *Sunambedu Muttukumarasami Mudalliar*, 23 I. A., p. 83. Their Lordships there held that the order of succession was as mentioned in the above-cited text of Mitakshara, and that the father's paternal aunt's son being merely a *pitri bandhu* must be postponed to the maternal uncle, though of the half-blood who is an *atma bandhu.*

II. The 2nd rule which is deducible from the authorities is that among persons of the same class, the *bandhus ex parte paterna* will take to the exclusion of the *bandhus* of the same class *ex parte materna.* Thus the *atma bandhus ex parte materna* will be postponed to the *atma bandhus ex parte paterna.* Similarly among the *pitri bandhus* those who trace through the father or his father take precedence to those who are related through the father's mother, *i.e.*, the father's *bandhus ex parte paterna* should have precedence over the father's *bandhus ex parte materna.*

On the same principle the *matri bandhus ex parte paterna* will have precedence over the *matri bandhus ex parte materna, i.e.*, the *matri bandhus* who trace through the mother's father have precedence over the *matri bandhus* who are related through the mother's mother merely.

This is consistent with the general principle of Mitakshara that the father's line should have precedence over the mother's line (*vide* Mayne, paras. 471 and 535).

In *Sundarammal* v. *Ranggasami Moodelliar*, I. L. R., 18 M. 193, their Lordships, Mr. Justice *Muthusami Aiyar* and Mr. Justice *Best* in postponing the claims of the mother's sister's son, to those of the paternal uncle's daughter's sons observed: "As between plaintiffs (paternal uncle's daughter's son) and 3rd defendant (mother's sister's son), the latter is a *bandhu ex parte materna* whilst the former are *bandhus ex parte paterna.*" (See also 20 M., p. 342 at page 349).

III. *The nearer line must be preferred to the more remote, i.e* :

The *bandhus* of one line (as for instance the father) should be exhausted before a *bandhu* in the next line could be let in. This is based upon the first principles of the Mitakshara itself.

The Mitakshara in the *sagotra* succession says that the sons, grandsons and great-grandsons should be exhausted before we ascend to the parents and the line of the father. The parents and the father's line must be exhausted before the grand parents and their line can be let in. Similarly the *bandhus* tracing through the propositus himself must have precedence over the *bandhus* in the father's line. This is but consistent with the general principles of computation of degrees recognized by the Hindu Law. For the Hindu Law treats the descendants of an ancestor having heritable rights not *interse*, but as regards the remoter ancestor and his descendants, as having superior rights over the latter. For when it is said that *sapinda* relationship ceases with the 7th person or the 5th (as the case may be), it is enough if a given person reaches the common ancestor within seven or five degrees, though the given person may not be within the 7th (or 5th) degree from the propositus himself.

This rule has been expressly recognized by their Lordships, Mr. Justice *Subrahmania Aiyar* and Mr. Justice *Benson* in the recent case of *Balusami Pandithar* v. *Narayana Row*, I. L. R., 20 M., p. 342, where they held that the sister's grandson is a nearer *bandhu* than the maternal uncle's son. Their Lordships observed: "There need be no hesitation whatever in saying that the doctrine (of spiritual benefits) ought not to be resorted to in

derogation of the great principles pervading the Law of Inheritance under the Mitakshara system. The first of such principles is that the nearer line excludes the more remote. Applying it here, the plaintiff must doubtless fail, since he traces his right as a *bandhu* through Vasudev's grandfather (maternal), while the 3rd defendant makes out his right through a nearer ancestor of Vasudev, *viz.*, his father. The learned vakil for the plaintiff laid considerable stress on the fact that the plaintiff is the *grandson* of Vasudev's maternal grandfather, whereas the 3rd defendant is the *great-grandson* of Vasudev's father. But it is not easy to see how this difference in the respective relationship affects the question under consideration. For the competition here is not between persons *descended from the same man,* but between those who are seeking to establish their right through different persons, *one of whom is unquestionably a nearer ancestor of the propositus than the other* and whose line consequently must take precedence."

IV. We have next to see whether the theory of spiritual oblations has any, and if so, what place in the Mitakshara succession of *bandhus.* Of course, as I have already pointed out, this theory has no place in determining whether a given person is a *sapinda* or not, and this seems now to be admitted on all hands.

There is, however, some difference of opinion, where the dispute is as to whether this or that *sapinda* or this or that *bandhu* succeeds.

In our opinion, the Mitakshara on the point is very clear. It rejects the theory of spiritual benefits by the offering of funeral oblations and adopts the rule of propinquity. For in chapter II, sec. iii, the author says:

"Besides the father is a common parent to other sons, but the mother is not so; and, since her *propinquity* is consequently greatest, it is fit, that she should take the estate in the first instance conformably with the text: To the nearest *sapinda* the inheritance next belongs" (verse 3).

"Nor is the claim in virtue of propinquity restricted to *sapindas,* but on the contrary, it appears from this very text, that the *rule of propinquity* is effectual, without any exception, in the case of *samanodakas* as well as other relatives, when they appear to have a claim to the succession" (verse 4).

If the fact of offering or acceptance of oblations does not create *sapindaship*, much less can it be a test as to the right of precedence over another, when a question arises as to the order of succession. The Mitakshara is essentially a system based upon consanguinity or affinity, and the question of heredity, as the question of the order of succession, should equally be decided by the above test of consanguinity or affinity.

From the illustrations given in the text of Vriddha Satatapa, it will be seen that there are cases of persons who do succeed as *bandhus*, though they do not offer funeral oblations either to the propositus or to persons to whom the propositus was bound to offer. It cannot, therefore, be pretended, that under the Mitakshara system of succession, the theory of superior religious efficacy has any place whatever.

When treating of the order of succession among the different classes of *bandhus*, Vijnanesvara says : "Here, by reason of *near affinity*, the cognate kindred of the deceased himself are his successors in the first instance: on failure of them, his father's cognate kindred : or if there be none, his mother's cognate kindred."

It might be noted that what is stated here as the ground of preference is the *nearness of affinity*. The theory of funeral oblations has no place at all. (*Vide* the observations of *Knox*, J., in *Subba Singh* v. *Sarafroy Kunwar*, I.L.R., 19 A., 223, at pp. 224 and 226, and Mayne, paras. 471, 472 and 535).

The observations of the Judicial Committee in *Lallubhai Bapubhai* v. *Cossibhai* I.L.R., 5 B., p. 110 at pp. 118 and 121, though made in a case arising in (and limited to) Western India, are also useful in determining what the law ought to be in the other Presidencies which are governed by the Mitakshara law. Their Lordships declare themselves, "prepared to assent to the conclusions "to which the Judges of the High Court, upon consideration of the "authorities, arrived that, by the law of the Mitakshara as inter-"preted and accepted in Western India, the preferential right to "inherit in the classes of *sapindas* is to be determined by family "relationship or the community of corporeal particles; and not alone "by the capacity of performing funeral rites. It may happen in

"some instances, the same person would be the preferential heir, "whichever of these tests was adopted."

A Full Bench of the Madras High Court in *Mari* v. *Chinnama,* I. L. R., 8 M., p. 107, observes at p. 125, that "the right to perform "the funeral ceremony does not involve a mutuality of right of "succession."

Against this view, however, we have the text of Viramitrodaya, a leading authority of the Mitakshara school and a respectable body of decisions which it would be difficult to overlook. For at p. 158 (Golapchandra Sirkar's Translation) Viramitrodaya says: "Hence "it is indicated that he alone is entitled to get the estate on whom "the estate being devolved conduces to the greatest amount of "spiritual benefit of the deceased owner, and that proximity in this "way is to be accepted as a general rule and reasonable." But as observed by *Bannerji,* J., in the case of *Suba Singh* v. *Sarafray Kunvar,* I. L. R., 19 A., p. 215 (at p. 231) there are other passages "where the author lays down the rule that, where the question "concerning the order (of succession) arises, there propinquity "determines the order (p. 186) and that 'greatness of propinquity "is alone the criterion of succession' (p. 194). Upon a careful "consideration of the Viramitrodaya, it appears that the rule of "propinquity is, according to Mitra Misra, the rule of preferable "succession, and that the capacity to confer spiritual benefit is, "as Dr. Jolly remarks, referred to, as an additional reason for the "right to succeed. According to the ruling of their Lordships of "the Privy Council in *Girdhari Lall Roy* v. *The Bengal Govern-"ment,* the Viramitrodaya is receivable as an exposition of what "may have been left doubtful by the Mitakshara; but where the "Mitakshara itself is clear and its meaning and intention are not "open to doubt, the Viramitrodaya cannot be accepted in pre-"ference to the Mitakshara. As I have shewn above, the Mitak-"shara enjoins in very distinct terms, in chapter II, section iii, pl. 4, "that for the purpose of determining the order of succession among "relatives of all descriptions, including *samanodakas,* the rule of "propinquity is to be applied without any exception."

But in the next passage (p. 232), the same Judge observes: "'It may be that, where two *sapindas* stand, with reference to

"propinquity in the same degree of nearness to the propositus, the "capacity to confer the highest amount of spiritual benefit should be "applied as a test to determine the order of priority. But where "the degrees of propinquity are different, the rule of religious "efficacy has according to the Mitakshara no application."

The observations of the Judicial Committee in *Bhyah Ram Singh* v. *Bhyah Ugursing,* 13 M. I. A., p. 373, are, however, important. No doubt, no question of precedence arose, and the remarks are only *obiter dictum.* But still as a dictum of the highest tribunal in the land, it is entitled to great weight. Their Lordships say :—" The question of preference is distinct from that of entire exclusion when a question of preference arises, as preference is founded on superior efficacy of oblations, that principle must be applied to the solution of the difficulty." This is begging the very question (*vide* also *Muthusami* v. *Muthukumaraswami* I. L. R., 16 M. 23 at p. 30, following Viramitrodaya; *Sri Raja Rau Lakhmi Kantaiyamma* v. *Sri Raja Inuganti Rajagopal Rau Ib.,* 21 M. 342 at p. 348).

The case of *Ganesh Chunder* v. *Nil Komu,* 22 W. R. 264, also recognises the principle of preference being given by reason of greater spiritual benefits conferred on the deceased by a claimant. But the decision itself in this particular case is right, as the sister's son being an *atma bandhu ex parte paterna* is to be preferred to the mother's sister's son who is only an *atma bandhu ex parte materna.*

In *Mohan Das* v. *Krishna Bai* I. L. R., 5 B. 597, the mother's brother's son is preferred to the mother's sister's son (the learned Judges, following 22 W. R. 264,) on the ground of superior religious benefits conferred by the mother's brother's son. On the analogy of the principle that the male line should be preferred to the female, which is the basis of the Mitakshara system (*vide* Mayne, paras. 471 and 535, 5th Edn.,) the mother's brother's son being descended from the agnate line of the maternal grandfather is to be preferred to the latter's cognate line.

V. The order of succession among the classes would therefore be as follows :—

(i) *Atma Bandhus.*

(*a*) Atma bandhus *ex parte paterna.*

(*b*) Do. do. *ex parte materna.*

(ii) *Pitra Bandhus.*

(*c*) Pitri atma bandhus *ex parte paterna.*

(*d*) Do. do. *ex parte materna.*

(*e*) Pitri pitri atma bandhus *ex parte paterna.*

(*f*) Do. do. *ex parte materna.*

(*g*) Pitri matri atma bandhus *ex parte paterna.*

(*h*) Do. do. *ex parte materna.*

(iii) *Matri Bandhus.*

(*i*) Matri atma bandhus *ex parte paterna.*

(*j*) Do. do. *ex parte materna.*

(*k*) Matri pitri atma bandhus *ex parte paterna.*

(*l*) Do. do. *ex parte materna.*

(*m*) Matri matri atma bandhus *ex parte paterna.*

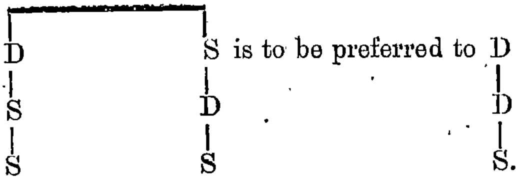
(*n*) Do. do. *ex parte materna.*

VI. Some other subsidiary rules may be laid down—

1*st*—Every female introduces a foreign element.

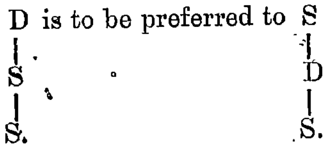
2*nd*—Where the degree is equal, the male descendants with a single foreign element are to be preferred to those with a double foreign element.

Thus:—




3*rd*—Where the degree is equal, and the foreign element is single, he is to be preferred who has a female (ancestor) immediately near the propositus or other ancestor above him.

Thus



Here the grandson's son is preferred to are granddaughter's son. This is but natural.

Similarly

D. is to be preferred to S
|    |
S    D
|    |
S    S
|    |
S.   S

and S is to be preferred to S
|    |
D    S
|    |
S    D
|    |
S.   S.

*4th*—Where the foreign element is double, the descendants of unbroken line of females must be postponed to the descendants of the line that is broken by the intervention of a female.

Thus D is to be preferred to D
|    |
S    D
|    |
D    S
|    |
S.   S.

Of course, if the two unbroken lines of females are near to the propositus or the ancestor above him, their line is to be preferred to the line of those who are not so near.

Thus D is to be preferred to S
|    |
D    D
|    |
S    D
|    |
S.   S.

*5th*—The descendants who have three foreign elements come last.

*6th*—Those who are of the whole blood are preferred to those who are only of the half blood (*Subba Singh* v. *Sarafrory Kunwar*, I. L. R., 19 A. 215).

We have now seen who one's bandhus are and what the order of succession is among them. It will be noted that we have not made reference at all to the females and to their rights of inheritance. Excluding Western India, where females are generally admitted, the Mitakshara does not recognise any other females than those referred to in the *sagotra* succession. These are the widow, daughter, mother, grandmother, &c. But the right to succession of the widow, &c., depends upon express texts. Beyond these, it may be stated generally that females as such have no rights of inheritance. In Southern India, however, there are decisions to the effect that females may succeed as *bandhus* after all the male *bandhus*. We do not wish to discuss the subject any further, as the subject is vast and distinct by itself.

P. R. GANAPATI AIYAR.

---

## NOTES OF INDIAN CASES.

**Abdul Aziz Khan Sahib** *v.* **Appayasami Naickar**, I. L. R., 22 M. 110. This is an interesting case which raises an important question. We do not know whether any attempt has been made to carry it up to the Privy Council. The decision of the High Court cannot be regarded as altogether convincing. An impartible zamindary was seized in execution and sold in 1873 and 1876. The question arose in 1893 whether the sale was of the whole zamindary or only of the life-interest of the then zamindar. The High Court holds that as the decision in *Sartaj Kuari* v. *Deoraj Kuari*, I. L. R., 10 A., 272, had not been passed, and the view then prevalent was that the holders of impartible zamindaries under the Mitakshara Law had only a limited estate, the purchaser took only the life-interest of the then zamindar. They rely upon the analogy of cases where upon a sale in execution of a decree against the father of a Hindu family, the question is raised whether the interest of the father alone or of the whole family passes to the purchaser. The analogy seems, however, to be questionable. In the latter case, there are two rights in question—the right of the father to sell his own share and secondly, the right of the father to sell the entire interest in the family property under certain circumstances. The Privy Council have treated it as a question of fact or of mixed fact and law whether in the particular case the limited interest or a larger interest was intended to be sold. But it has been settled in the case of an impartible zamindary governed by the Mitakshara Law that the holder

has an absolute estate, and this law having been laid down by the Privy Council, not for any particular period, but as a true principle of law always in force and the documents of sale passing the entire property to the zamindar it seems doubtful whether it is competent to the court to hold that only a limited interest passed to the purchaser, because the parties were under the misconception as regards the law relating to the alienability of impartible estates. We must, however, admit that in the case in *Pettachi Chettiar* v. *Sangili Vira Pandia Chinnatambiar*, I.L.R., 10 M., 241, the Privy Council without reference to the circumstance that the sale was of an impartible estate held following the findings of the Courts below that the documents of sale purported to convey only the zamindar's life-interest. In *Meenakshi Nayudu* v. *Immudi Kanaka Ramaya Goundan*, 12 M., 241, the Privy Council did'not rely upon the sale being that of an impartible estate to show that the whole interest passed, but upon the documents in the case. The report of the latter case does not show whether the zemindary was partible or impartible.

**Ramasami Ayyar** *v.* **Vengidusami Ayyar**, I. L. R., 22 M., 113. We congratulate Mr. Justice *Subrahmania Aiyar* and Mr. Justice *Moore* upon their decision in this case. The question raised was a novel one and their Lordships have understood the Hindu Law liberally. It is not after all a hide-bound system of rules but consists of principles which are capable of adaptation to the circumstances of modern life. The mother who succeeded to her son's estate gave a small portion of her property to her son-in-law on the occasion of her daughter's marriage. This was held to be within the competency of the holder of the life-estate.

**Srinivasa Swami** *v.* **Ramanujachariar**, I. L. R., 22 M. 117. It is to be regretted that the error committed by the court in *Strinivasa Ayyangar* v. *Strinivasa Swami*, I.L.R., 16 M., 31, has been re-affirmed in this case. There seems no reason why persons interested in making a valid appointment to the office of trustee should not sue for a declaration if they are so entitled. The Chief Justice and Mr. Justice *Parker* said in the earlier case that the plaintiffs should ask for appointment of a proper trustee and for possession of the trust properties being delivered to him. We can see no justification for this position. We do not, of course, mean to suggest that the decision in the case under notice is questionable. For the principle upon which it rests is simply this. That where the plaintiffs say they have the power of appointment and ask for possession to be given to a person to be appointed by them under the order of the court, they are asking the court to do a thing which is perfectly unnecessary, for they may appoint and their appointee may sue for possession.

**Groves** *v.* **Administrator-General of Madras**, I.L.R., 22 M., 119. We welcome this decision as it seems, if we remember aright, to be almost the first judgment of Mr. Justice *Boddam* of any length upon a question of law excepting, perhaps, his singular judgment in the Full Bench case upon the effect of S. 588 upon appeals from a single Judge under the Letters Patent, all the more so because his Lordship happens to be right. Execution proceedings taken after the death of the judgment-debtor without the representative being brought upon the record are a nullity. We cannot see how they can be otherwise. The proceedings are entirely judicial and they presuppose the existence of the opposite party and notice to him. A suit cannot proceed to judgment after the death of the defendant, nor can execution proceedings go on.

**Subba Reddy** *v.* **Chengalamma**, I. L. R., 22 M., 126. This case raises a question of some degree of novelty. Supposing a Hindu widow permits quarrying on her estate, is it such dealing with the substance of the property as to give rise to a cause of action on the part of the reversioners? If the stones quarried are regarded as the produce of the estate, the widow being at perfect liberty to deal with the annual income, her action is perfectly legal.

But are the stones merely the annual income of the estate? If the estate which descends from the husband is a quarry having regard to the mode in which it was enjoyed in the husband's time, it cannot be supposed that a continuance of that mode of enjoyment in the widow's time is an interference with the *corpus* of the estate. But where the quarrying is first done by the widow the question is more difficult. The powers of a Hindu widow are larger than those of a life-owner for certain purposes. But in the absence of any such purposes her rights are not in excess of those of the holder of a life-estate. In the enjoyment of the estate, we have nothing to do with the special purposes for which the whole estate could be dealt with by a Hindu widow. The question, therefore, is narrowed to this, whether a tenant-for-life is at liberty to allow quarrying upon the estate, the effect of which is to remove the substance of the soil and thereby to diminish the value of the *corpus* at the termination of the life-estate. We doubt, however, whether the question is capable of an inflexible answer. It is easy to imagine the estate is of such a character that the continuance of quarrying operations may have no appreciable effect upon the substance of the estate, but may give it an additional value. In the absence, however, of such special circumstances, if the burden of proof will be upon the widow or her alienees, we should imagine the act will be waste entitling the reversioner to interfere.

**Vibhudapriya Thirthasami v. Vidianidhi Tirthasami,** I. L. R., 22 M., 131. We are unable to see the distinction between the case under notice and the decision in *Nagamuthu* v. *Savirimuthu*, I.L.R., 15 M., 226. This was a decree by consent against two defendants for possession of land, and the suit is dismissed against others and those others object to execution on the ground they are in possession. In the case in 15 M., a mortgage decree was executed by sale of the judgment-debtor's interest and the plaintiff purchaser sues for possession of the share purchased against those who are exonerated from the decree. The question was raised whether a separate suit will lie in the face of S. 244; and the court held that it was a matter relating to the execution of the decree, for there was no decree relating to those others from whom possession was sought. In the case under notice if the possession was with the person as against whom the suit was dismissed, the decree could not be enforced. The question cannot be said to relate to execution in this case any more than the question as to possession.

**Zamindar of Tuni v. Bennayya,** I.L.R., 22 M. 155. We are by no means clear about the right of appeal in a case of rejection of the appeal memorandum. An order rejecting a plaint is specially included in the definition of a decree, although there is no reason why an order rejecting an appeal should not be put on the same footing. It seems, however, clear that it has not been. A decree has been defined as an adjudication of a right claimed or defence set up which decides the suit or *appeal*. An order rejecting a plaint is also specially enumerated. As the definition of a decree makes reference to appeals also, the absence of reference to the appeal memorandum in relation to the order of rejection is, it seems to us, conclusive against its being regarded as a decree. S. 582 cannot extend the definition, because it simply says the procedure in appeals shall be the same as in suits; and the definition of "decree" is no part of the procedure in suits. It may, however, be that a dismissal of the appeal which does amount to a decree is wrongly called a rejection as in the case in *Ayyanna* v. *Nagabhooshanam*, I. L. R., 16 M., 285. The erroneous description cannot prevent an appeal.

There is, however, a more important question as regards the inherent power of a court to reject a memorandum of appeal containing scandalous matter. There is no provision in the code authorizing rejection of the plaint or memorandum of appeal, because it contains scandalous matter. It does not follow that because a party is in contempt his suit should be dismissed. But it seems to us that the court may refuse to receive a plaint or memorandum of appeal which is

scandalous. It would be quite otherwise if there was a suit pending whether for some disobedience the suit may be dismissed. But the court, it seems to us, is not bound to take the plaint or appeal memorandum which initiates judicial proceedings. Such a refusal is not a dismissal of the suit or appeal but a refusal to accept the preliminary step as a *boná fide* step.

The judgment of Mr. Justice *Subrahmania Aiyar* as regards the grounds upon which the decision of a lower court can be impeached on account of bias or interest is highly instructive.

**Chelamayya** *v.* **Varadayya**, I. L. R., 22 M., 166. Mr. Chamier will do well to take better care of his head-notes. We have not come across cases where three members are managing members of a joint Hindu family, although there is nothing impossible in it. In the case under notice there were three brothers who borrowed a debt, but it does not appear that they were all managers.

The judgment is a very important one. It lays down almost for the first time, we can say, in distinct terms, that a debt borrowed by the manager for a family purpose is recoverable from him personally and from the family estate, but not personally as against the other members of the family. Where the borrower acts merely as the agent, express or implied, the principal would, of course, be liable personally. But the mere ground of managership and family purpose is not sufficient to create a personal liability. We have not examined the matter sufficiently to express our full concurrence, but we suppose the decision is right.

**Vias Ram Shankar** *v.* **Ralla Ram Misir**, I.L.R., 21 A., 89. We see no warrant for the Allahabad Court limiting the scope of S. 25 of the Provincial Small Cause Courts Act to the class of cases covered by S. 622 of the Code of Civil Procedure. The two sections form part of different enactments, and the language used is entirely different. Nor can we see any justification for taking S. 622 as a guide to the interpretation of S. 25 of the Small Cause Act. It may be that S. 25 only confers a discretionary power which should be exercised in cases wherein justice has not been done and not merely where there is a technical error of law. But the judicial idea of substantial injustice should be regulated by the substantive law of the country, and a court is not at liberty to suppose that justice has been done where the clear provision of the law has been violated.

**Rameswar Koer** *v.* **Mahomed Mehdi Hossein Khan**, I. L. R., 26 C., 39. A question of some importance has been debated in some

decisions in the Indian High Courts, as to whether S. 209, Civil Procedure Code, is abrogated by the provisions of Ss. 86 and 88 of the Transfer of Property Act with regard to the rate of interest upon mortgages for the period subsequent to the institution of the suit. The decision of the Privy Council in the case under notice does not deal with that question generally, but points out that the discretion to award what interest the court pleases is controlled by the provision to award the contract rate up to the period of six months from the date of the decree in the case of mortgages. The Allahabad High Court is of opinion that there is no power to award interest beyond the six months from the date of the decree while the Calcutta High Court holds the discretion under S. 209 to be unfettered after that period. The head-note in the case under notice would seem to suggest that the contract rate should be awarded down to the date of realization. But the Privy Council were only dealing with interest up to the date fixed for realization, namely, six months from the date of the decree. There is no question raised about interest beyond that date, which is the point of conflict between the Allahabad and Calcutta High Courts.

**Chhato Ram** *v.* **Bilto Ali**, I. L. R., 26 C., 51. It has been held in several Calcutta cases that an acknowledgment by a guardian of an infant cannot give a fresh starting point against the infant. The Bombay High Court is of the same opinion, *Maharana Shri Ranmal Singji* v. *Vadelal Vakhatchand*, I. L. R., 20 B., 61. The Madras High Court seems to think otherwise, See *Sobhanadri Appa Rau* v. *Sriramulu*, I. L. R., 17 M., 221; *Kailasa Padiachi* v. *Ponnukonnu Achi*, *Ib.* 18 M. 456. In the case of a manager of a Hindu family, however, the power to acknowledge a debt seems to be accepted, *Chinnaya Nayudu* v. *Gurunatham Chetti*, I.L.R., 5 M., 169; *Bhasker Tatya Shet* v. *Vijalal Nathu*, *Ib.* 17 B., 512. The question in the case of a guardian is whether the acknowledgment is a necessary part of the management of the estate; or a step which is beneficial in the interests of the minor. The question is not capable of one and the same answer under all circumstances. Circumstances may well be conceived where a guardian in order to avert costly litigation or pressure upon the estate may give an acknowledgment which may stay the hand of the creditor. Such acknowledgment would then be a prudential act of management and ought to be within the power of the guardian.

**Kameshwar Pershad** *v.* **Amanutulla**, I. L. R., 26 C., 53. There is a point raised in the judgments of *Banerjee* and *Rampini*, J. J., in this case, that, where secondary evidence has been improperly received without objection, it may be rejected on appeal. We doubt whether this view is correct.

If relevant evidence were admitted without objection, the want of objection cannot cure the defect. But as regards the mode of proof, the silence of the opposite party must be deemed to amount to a waiver of the objection if the reception of the evidence cannot be objected to on appeal. See *Luchmeedhur Pattuck* v. *Rughoobhur Singh*, 24 W. R., 285; *Bommarauze Bahadur* v. *Rangasamy Mudaly*, 6 M. I. A., 232, and other cases cited, Ameer Ali's Evidence, pp. 41 and 42. See also Field on Evidence, p. 668.

**Hudson v. Bosdeo Bajpye**, I.L.R., 26 C., 109. It is to be regretted that the question which is the question of importance in the case has not been considered by the learned Judges who took part in it. A. sues B. and C. and obtains a decree against B. B. appeals against A.; and C. is not made a party to the appeal. The Courts have always held that under S. 559 the appellate court has the power to make C. a respondent even after the period of limitation for preferring the appeal has expired. But does the making of C. a party respondent enable the court to pass a decree in favor of A, the original respondent upon the record, as against the added respondent C. Such a power can only exist in case there is a memorandum of objections preferred by A. But under the Code of Civil Procedure as amended by Act VI of 1888, there is a provision authorizing one respondent to prefer a memorandum of objections against another. The matter was, perhaps, doubtful under the Code as it stood before. At all events the Madras High Court in *Timmayya Mada* v. *Lakshmana Bhakta*, I. L. R., 7 M., 215, differing from certain rulings of the Calcutta High Court in the Weekly Reporter, *Pitambur Pyne* v. *Toolse Dossee*, 7 W. R., 39; and *Goonomonee Dossia* v. *Parbutty Dossia*, 10 W. R., 326, held, that one respondent might prefer a memorandum of objections against another. But that view appears to us to be no longer tenable under the amended language of the Code which speaks of notice of the memorandum of objections by the respondent to be given to the appellant and not to the co-respondent. Even in the case of *Bhishanchurn Roy Chowdhry* v. *Jogendra Nath Roy*, I. L. R., 26 C., 114, the matter is not fully discussed with reference to the language of the Code.

**Shyama Charan Mandal v. Heras Mollah**, I. L. R., 26 C., 160. S. 92 of the Evidence Act and its provisoes are a difficult study; and the decisions upon them are not always intelligible or harmonious. Proviso 4 excludes evidence of a subsequent oral agreement where the contract is required by law to be in writing or has been registered. Evidence of conduct has been held admissible under this section to show that what is an apparent sale is a mortgage; and such evidence has been held

admissible on the ground that it is not evidence of an oral agreement. If this is a correct principle, there is no reason why it should not apply to other contracts and apparent sales. In *Mayandi Chetti* v. *Mrs. Oliver*, 8 M. L. J. R., p. 196, the Court was unable to hold that conduct was not oral agreement within the meaning of the proviso. We have no doubt the sounder view is that taken in the case under notice. But we have no difficulty in saying that the proviso requires to be re-drafted in a more intelligible form with reference to the decisions.

**Sheodeni Tewari *v.* Ram Saran Singh,** I. L. R., 26 C., 164. A mortgagee purchased the mortgage property in execution of a money-decree contrary to the provisions of S. 99 of the Transfer of Property Act. He sues for possession. S. 244, we should imagine, is no bar to the suit. The purchaser's right to possession is not a question relating to execution though the parties are parties to the suit. But we think if the sale was contrary to S. 99, the judgment-debtor should have objected to it under S. 244 and had the sale set aside. If the sale were not so set aside, the judgment-debtor is precluded by S. 244 from questioning it. The learned Judges who decided the case under notice have apparently overlooked this in refusing plaintiff possession; and we do not think there is any such unanimity in the decisions of the courts as to warrant the court in the conclusion arrived at.

**Pardhan Bhukhan Lal *v.* Narsing Dyal,** I. L. R., 25 C., 300. Enhanced interest from the date of default cannot be relieved against under S. 74 of the Contract Act. It is, of course, possible to relieve against a contract, the terms of which are unconscionable on equitable considerations. It has been settled law that prospective enhancement is not a penalty. It is, of course, possible that the enhancement may be evidence taken in conjunction with other circumstances of the bargain being such as to entitle the debtor to relief. We think the judgment of *Rampini*, J., accepting the summary of the law from Shephard and Conninghan's Contract Act lays down the law aright. It must be remembered, however, that the enhanced rate being of itself not sufficient to entitle the debtor to equitable relief, fraud or oppression, improper dealing with an ignorant person must be shown before relief can be obtained.

## SUMMARY OF RECENT CASES.

*Civil Procedure Code, Chapter XX—Insolvency—Holder of decree on mortgage not entered amongst the scheduled creditors—Decree-holder not debarred from executing his decree.*

### Sheoraj Singh *v.* Gauri Sahai.

*Held* that a judgment-creditor holding a decree for sale upon a mortgage against an insolvent judgment-debtor will not, by reason of his debt not having been scheduled in the insolvency proceedings, lose his right to execute his decree. *Haro Pria Dabia* v. *Shama Charan Sen* (I. L. R., 16 C., 592), and *Shridhar Narayan* v. *Atmaram - Govind* (I. L. R., 7 B., 455), referred :—*Allahabad Weekly Notes for* 1899, *p*. 45.

---

*Civil Procedure Code, S. 53—Plaintiff—Amendment—Plaint not signed by plaintiff or by any one authorized by him in that behalf.*

### Marghub Ahmad *v.* Nihal Ahmad.

*Held*, where a document which purported to be a plaint was found not to have been signed by the plaintiff or by any one duly authorized by him in that behalf, that it was not competent to a Court before which such document came in appeal, to allow the so-called plaintiff to sign or affix his mark to the said document, and thereby to convert it into a valid plaint. The document was *ab initio* invalid, and the only order possible in respect of it was an order of rejection. *Katesar Nath* v. *Aggyan* (Weekly Notes, 1894, page 95), followed. :—*Allahabad Weekly Notes for* 1899, *p*. 55.

---

*Civil Procedure Code, s. 108—Decree ex parte—Death of judgment-debtor—Application by legal representative to have the decree set aside.*

### Janki Prasad *v.* Sukhrani.

*Held* that where a judgment-debtor, against whom a decree has been passed *ex parte* for default of appearance, dies, his legal representative is not competent to apply under S. 108 of the Code of Civil Procedure to have the *ex parte* decree set aside. :—*Allahabad Weekly Notes for* 1899, *p*. 58.

---

### Rachappa Nilkanthappa *v.* Maugesh Mahadaji Sharaff.

Although, as a general rule, *lis pendens*, except in certain classes of suits, ends with the decree, yet where a plaintiff actively seeks to bring

the mortgaged property to sale in execution of his decree, he is entitled to be protected from the effects of any alienation by his judgment-debtor, and, in such a case, the execution proceedings revive or give continuance to the *lis pendens.*

The mere fact of obtaining a decree on an unregistered mortgage will not sweep away the rights of, and give priority over, intermediate mortgagees who hold registered deeds and are in possession and are not parties to the litigation which ended in the decree :—*Printed Judgments of the B. H. C. for* 1898, *p.* 386.

---

*Section* 4—*Easements Act* (*V of* 1882), *Section.*7, *explanation, illustration* (*h*)—*Water-course—Natural stream—Water-course not restricted to artificial channels—Obstruction to use of water.*

**Narayan Hari Deval *v.* Keshav Shivram Deval.**

When the water flows in a defined channel or course it fulfils the definition of "a natural stream" given in the explanation of Section 7 of the Easements Act (V of 1882), and the channel of such a stream would be a water-course.

The law as to riparian proprietors is the same in India as in England and is stated in illustration (*h*) of Section 7 of the Easements Act (V of 1882). Each proprietor has a right to a reasonable use of the water as it passes his land, but in the absence of some special custom or easement, he has no right to dam it back or exhaust it so as to deprive other riparian owners of like use :—*Printed Judgments of the B. H. C. for* 1898, *p.* 390.

---

*Limitation Act XV of* 1877, *Schedule* 2, *Article* 127, *applicability of, to Mahomedans—Mahomedans living joint as Hindus—Mahomedans adopting Hindu manners and customs.*

**Sayadalli valad Kasimsha *v.* Aminibi kom Sayad Khadirsaheb.**

Article 127 of the Second Schedule of the Limitation Act, XV of 1877 applies to Mahomedans who have so far adopted Hindu manners and customs as to live joint and to keep their property undivided :—*Printed Judgments of the B. H. C. for* 1898, *p.* 393.

---

*Limitation—Sale in execution of decree—Formal possession given to purchaser—Suit by purchaser—Hindu Law—Undivided family—Attachment of member's share in execution—Sale after member's death—Right of survivorship—Purchaser's title.*

## Antaji Yeshwant Rajadhyaksh *v.* Lakshmibai Kom Balaji.

A suit by an auction-purchaser against the judgment-debtor, if brought more than 12 years after he took symbolical possession, would be time-barred.

The attachment of an undivided share of a member of a Hindu family, if levied during his lifetime, in execution of a decree at the instance of his creditor, will be regarded as sufficient to support the alienation of the member's interest in the estate or a sale under the execution. The fact that the sale took place after the member's death would be immaterial, and a suit brought by the purchaser within 12 years of the sale would not be time-barred. *Mudho Parshad* v. *Meherban Singh* (I. L. R., 18 C., p. 157) referred to :—*Printed Judgments of the B. H. C.* 1898, *p.* 400.

---

*Mahomedan Law—Gift—Donor and donee in joint possession.*

## Gahirmal Umaram *v.* Maktambi kom Husein.

Under Mahomedan Law if the donor and donee remain in joint possession of the property given, sufficient delivery of possession has not been made, except in the cases of gifts (*a*) from a wife to her husband and (*b*) from a father or other guardian to his ward :—*Printed Judgments of the B. H. C. for* 1898, *p.* 402.

---

*Act to make better provision for the case of the estates of lunatic not subject to the jurisdiction of the Courts of Judicature (Act XXXV of 1858)—Unsoundness of mind—Suit by a next friend—Next friend—Equity, principles of, to be observed and applied—Procedure—Practice.*

## Pransukhram Dinanath *v.* Bai Ladkor.

Where a person of unsound mind, who is not adjudged to be so under Act XXXV of 1858 or any other law for the time being in force, is incapable of acting for himself he should be allowed to sue by a next friend on his behalf as regards that which is *primâ facie* for his benefit. The Court ought to be satisfied of the title of the next friend to intervene, and it ought to be satisfied that the person is of unsound mind and

that he stands in need of protection as regards his property, and it ought to be shown that it would be for his true interest that the Court should exercise its jurisdiction.

*Held*, also, that the principles of Equity as applied in the practice of the Courts of England should be observed in the Courts of this country in cases in which there was no law existent which laid down a different procedure :—1 *Bombay Law Reporter*, p. 88.

---

*Hindu Law—Maintenance, right of—Daughter-in-law can claim maintenance from mother-in-law out of the self-acquired property of her father-in-law—Property, self-acquired or ancestral, distinction in.*

**Yamunabai kom Babaji Kavade v. Manubai kom Tatya Kavade.**

The widow of a predeceased son, who lived in union with his father, has a legal right to claim maintenance from her mother-in-law when the latter succeeds as heir to her husband, who left only self-acquired property at the time of his death :—1 *Bombay Law Reporter*, p. 95.

---

*Civil Procedure Code, s. 244—Execution of decree—Jurisdiction of Court executing the decree.*

**Liladhar v. Chaterbhuj.**

*Held*, that when a decree for the sale of specific mortgaged property is being executed, a person who does not claim through the mortgagor cannot in execution contend that the mortgagor was not competent to make the mortgage, and that the decree was one which ought not to have been passed. *Maluji* v. *Fakir Chand* (I. L. R., 22 B., 225) ; *Seth Chand Mal* v. *Durga Dei* (I. L. R., 12 A., 313) ; *Sanwal Das* v. *Bismillah Begam* (I. L. R., 19 A., 480); and *Lochan Singh* v. *Sant Chandar Mukerji* (Weekly Notes, 1899, p. 24), referred to :—*Allahabad Weekly Notes for* 1899, p. 46.

---

*Act No. I of 1872 (Indian Evidence Act), s. 115—Admission—Estoppel—Admission of point of law no estoppel.*

**Jagwant Singh v. Silan Singh.**

An admission on a point of law is not an admission of a 'thing' so as to make the admission matter of estoppel within the meaning of S. 115 of the Evidence Act. *Jottendro Mohan Tagore* v. *Gnanendro Mohun*

*Tagore* (L. R., Sup., I. A., 47), and *Gopee Lal* v. *Mussamut Sree Chundraolee Budhojee* (11 B. L. R., 391) referred to :—*Allahabad Weekly Notes for* 1899, *p.* 66.

---

*Civil Procedure Code, s.* 108—*Decree ex parte—Suit to set aside as fraudulently obtained a decree ex parte—Application to set aside ex parte decree.*

**Dwarka Prasad *v.* Lachhoman Das.**

An *ex parte* decree was passed against a defendant. The defendant—judgment-debtor—applied under S. 108 of the Code of Civil Procedure to have such *ex parte* decree set aside, but his application was dismissed as barred by limitation. *Held,* that the defendant was not thereafter precluded from bringing a suit to set aside the *ex parte* decree as having been obtained by fraud. *Pran Nath Roy* v. *Mohesh Chandra Moitra* (I. L. R., 24 C., 546) followed :—*Allahabad Weekly Notes for* 1899, *p.* 67.

---

*Civil Procedure Code, S.* 588 (25)—*Appeal from order—Remand—Appeal from order of remand* (*Civil Procedure Code*), *S.* 562.

**Jhanday Lal *v.* Sarman Lal.**

*Held,* that no appeal will lie from an order made under S. 562 of the Code of Civil Procedure in an appeal under S. 583 from an order under S. 485 of the Code. *Athura Nath Ghose* v. *Nobin Chandra Kundu Biswas* (I. L. R., 24 C., 774) followed:—*Allahabad Weekly Notes for* 1899, *p.* 68.

---

*Act No. IV of* 1882 (*Transfer of Property Act*), *s.* 90—*Balance "legally recoverable"—Limitation—Act No. XV of* 1877 (*Indian Limitation Act*), *sch. ii, art.* 116.

**Badri Man *v.* Raja Ram.**

Every suit on a mortgage containing an express or implied covenant to pay the mortgage-money otherwise than out of the mortgaged property must be regarded as impliedly, if not expressly, a suit claiming such relief, the point being that the plaintiff, instead of being obliged to include a prayer for such relief in the plaint, may wait until it appears that the sale-proceeds are insufficient, and then make the prayer in an application under S. 90 of the Transfer of Property Act. *Musaheb Zaman Khan* v. *Inayat-ullah* (I. L. R., 14 A., 513); *Bageshri Dyal* v.

*Muhammad Naqi* (I. L. R., 15 A., 331); *Hamid-ud-din* v. *Kedar Nath* (I. L. R., 20 A., 386); and *Chattar Mal.* v. *Thakuri* (Weekly Notes, 1898, p. 138) referred to;—*Allahabad Weekly Notes for* 1899, *p.* 22.

---

*Land-holder and tenant—Trees—Property in trees growing on tenant's holding—Burden of proof—Civil Procedure Code, S.* 561—*Appeal—Objections by respondents—Letters Patent, S.* 10.

**Kausalia *v.* Gulab Kunwar.**

*Held*, that the property in trees growing on a tenant's holding is, by the general law, vested in the zamindar, and a tenant is not entitled, in the absence of special custom, the burden of proving which is on him, to cut down and sell such trees. *Imdad Khan* v. *Bhagirath* (I. L. R., 10 A., 159); *Nafar Chandra Lal Chaudhuri* v. *Ram Lal Pal* (I. L. R., 22 C., 742); and *Ruttonjee Edulji Shet* v. *The Collector of Thanna* (11 M. I. A., 295), referred to.

*Held*, also, that S. 560 of the Code of Civil Procedure is not appliable to appeals under S. 10 of the Letters Patent:—*Allahabad Weekly Notes for* 1899, *p.* 72.

---

*Criminal Procedure Code, S.* 556—*Meaning of the expression "personally interested"—Magistrate initiating proceedings against an octroi moharrir on information by the Secretary of the Municipal Board.*

**In the matter of the petition of Inayat Husain.**

The words "try any case" in S. 556 of the Code of Criminal Procedure include the hearing of an appeal. *Nistarini Debi* v. *Ghose* (I. L. R., 23 C. 44), followed.

Where a Magistrate has in some extra magisterial capacity, for example, as Collector or as Chairman of a Municipal Board, initiated proceedings against an accused person, he will be debarred by S. 556 of the Code of Civil Procedure from trying the case. But if he has merely initiated proceedings under S. 190 of the Code in his magisterial capacity, S. 556 can have no application:—*Allahabad Weekly Notes for* 1899, *p.* 74.

---

*Act No. XLV of* 1860 (*Indian Penal Code*), *Ss.* 34, 397—
*Dacoity—Commission of grievous hurt in the course of a dacoity —Persons liable under S.* 34, *liable also under S.* 397.

**Queen-Empress *v.* Mahabir Tiwari.**

*Held*, that the words " such offender " in S. 397 of the Indian Penal Code includes any person who, though he may not himself have caused the grievous hurt, is nevertheless liable for it by reason of S. 34 of the Code :—*Allahabad Weekly Notes for* 1899, *p.* 76.

---

*Act No. XLV of* 1860 (*Indian Penal Code*), *S.* 148—
*Rioting armed with deadly weapons—Persons who are liable to be convicted under S.* 148.

**Queen-Empress *v.* Ram Saran Rai.**

Where a number of persons, some of whom had been armed with deadly weapons and others not, had been tried and convicted under S. 148 of the Indian Penal Code, it was *held* on appeal to the High Court that only those who were shown to have been armed could properly be convicted under S. 148 :—*Allahabad Weekly Notes for* 1899, *p.* 77.

---

*Hindu Law—Joint Hindu family—Liability of sons to pay debts incurred by father—Creditor's remedy against sons not barred by reason of his having sued the father separately—Mortgage— Act No. IV of* 1882 (*Transfer of Property Act*), *S.* 85.

**Dharam Singh *v.* Angan Lal.**

Although a decree may have been obtained against the father of a joint Hindu family for a debt incurred by him, a subsequent suit is maintainable against the son in respect of the same debt for the enforcement of the son's liability for it, such debt being one which the son is legally bound to pay.

The creditor may in his original suit implead the son, but his omitting to do so will not deprive him of his subsequent remedy against the son.

There is no difference in principle as regards the subsequent remedy of the creditor against the son between the case of a debt secured by a mortgage and a simple money debt.

*Lachmi Narayan* v. *Kunji Lal* (I. L. R., 16 A., 449); *Balmakund* v. *Sangari* (I. L. R., 19 A., 379); *Bhawani Prasad* v. *Kallu* (I. L. R., 17 A., 537); *Ramasami Nadan* v. *Ulaganatha Goundan* (I. L. R., 22 M., 49); *Arabudra* v. *Dora Sami* (I. L. R., 11 M., 413); and *Nanomi Babuasin* v. *Modhun Mohun* (I. L. R., 13 C., 21), referred to.

The obligation of a Hindu son to pay his father's debt is not an obligation which he has incurred jointly with his father, and the creditor's cause of action is not a single cause of action which is exhausted upon a decree being obtained against one of them only. *Hemendro Coomar Mullick* v. *Rajendro Lall Moonshee* (I. L. R., 3 C., 353); *Dhunput Sing* v. *Sham Soonder Mitter* (I. L. R., 5 C., 292); and *Hoare* v. *Niblett* (L. R., 1891, 1 Q. B., 781), referred to:—*Allahabad Weekly Notes for* 1899, *p.* 78.

---

*Assignment of mortgage to one surety—Giving time to principal—Suit for contribution against a co-surety.*

**Greenwood** *v.* **Francis** [1899], 1 Q. B. 312 C. A.

Three persons, directors of a company, jointly and severally guaranteed re-payment of a sum of money advanced to the company upon a mortgage-deed and it was expressly agreed between them that although as between the company and the directors, the latter were to be simply sureties, yet as regards the creditors they were to be principal debtors and should not be exonerated by the creditors giving time to the principal debtor, or by any other forbearance, act, or omission of the creditors towards the debtor. The plaintiffs, two of the sureties, paid the money due on demand made by the creditor and obtained an assignment of the mortgage. They now brought this suit against the co-surety for the recovery of one-third of the amount they paid to the creditor. The question was whether the co-surety was not exonerated from liability to pay contribution, by reason of the fact that the assignees of the mortgage had given time to the company that had purchased the good will, premises and stock-in-trade of the debtor company. It was held by the Court of Appeal (*A. L. Smith*, *Rigby*, and *Collins*, L.JJ.) that the principle of law whereby a surety was discharged by the principal creditor giving time to the principal debtor should not be extended to the case of a surety sued for contribution by a co-surety who had given time to the principal debtor, and that even supposing that the plaintiffs in the case were not simply sureties who had paid the creditor but had come to occupy the position of principal creditors by

reason of the assignment, the principal creditors themselves having had express power to give time to the principal debtor, their assignees had lost no rights by giving time to the debtor.

---

*Bankruptcy—Proof of creditors—Claim of a dissolved Corporation—Right of Crown—Bone vacantia.*

*In re* **Higginson and Dean** [1899], 1 Q. B. 325.

Where a trading firm became bankrupt and a Corporation proved in the bankruptcy and after the dissolution of this Corporation the Official Assignee discovered that the bankrupt firm had certain railway shares and recovered the value of the same, a question was raised as to whether the Crown had the right to stand in the place of the dissolved Corporation and receive the dividend to which the Corporation would, but for its dissolution, have been entitled. It was contended by the other creditors, that with the dissolution of the Corporation the debt ceased to exist, that, therefore, the fund should be distributed among the other creditors, and that even if the debt did not cease to exist, the money due to the dissolved Corporation should be distributed among the other creditors as unclaimed dividend.

It was decided by *Wright*, J., that there was little or no authority for the position that the debt ceased to exist on the dissolution of the Corporation, that, therefore, the Crown was entitled to the dividend due to the dissolved Corporation as *bona vacantia;* that even supposing that the debt would cease to exist on dissolution, the debt in the present instance had ceased to be a simple debt and had passed to the stage of equitable execution and the equitable interest so created passed to the Crown as *bona vacantia;* (or putting the same thing in another form) that the assignees in bankruptcy held the shares in trust to the bank and the other creditors, that on the dissolution of the Corporation their title as trustees did not cease to exist as it did not depend upon the continued existence of any particular debt or any particular creditor and that the Crown was entitled to step into the shoes of any *cestui que trust* who might cease to exist; and that either the Crown or the creditors were entitled to claim, and in either case the dividend cannot be said to be unclaimed.

---

*Principal and Agent—Contract to be binding on the certificate of Agent—Bribe accepted by Agent—Certificate, invalidity of —Avoidance of contract.*

**Shipway v. Broadwood** [1899], 1 Q. B. 369 C. A.

The defendant agreed to purchase of the plaintiff, a horse-dealer, a pair of horses, if a veterinary surgeon certified them as sound, and deputed the surgeon to examine the horses for him. The surgeon having certified, the defendant took delivery of the horses and sent a cheque for the price. Soon after finding the horses to be unsound, he returned the horses and stopped the cheque. An action was brought upon the cheque and it was found that the surgeon had accepted money from the plaintiff on a promise to have the horses sold for him. It was held by the Court of Appeal (*A. L. Smith, Chitty,* and *Collins,* L.JJ.) in confirmation of the decision of *Day,* J., that the money paid to the surgeon was really a bribe to induce him to certify the horses as sound, that it was immaterial to inquire to what extent the bribe or the offer of it influenced the person to whom it was given or offered, that the certificate was invalid and that the plaintiff could not recover upon a contract which depended upon the validity of the certificate.

---

*Bond—Condition—Breach of Injunction—List of acts prohibited—Liquidated damages—Order XIV Rules.*

**Strickland v. Williams** [1899], 1 Q. B., 382.

An injunction had been obtained in the High Court, to restrain the defendant from trespassing upon the land of the plaintiff; and for breach of this injunction the defendant was lodged in gaol. The defendant while in gaol executed a bond for £100 to the plaintiff. The condition in the bond ran thus: "If the said . . . . Williams (defendant) shall from time to time or at all times hereafter (in obedience to a perpetual injunction granted by the High Court of Justice . . . . ) refrain from trespassing upon . . . . Strickland's land . . . . or garden . . . . or walls, gates or fences thereof or inclosing the same and from pulling down or removing or otherwise injuring the same or any part thereof . . . , then the above written bond or obligation shall be void". On a subsequent breach of the injunction, this suit was brought to recover the money upon the bond. The Master having allowed the plaintiff to enter judgment for £100 under Order XIV, it was contended that various prohibited acts having been mentioned in the bond, the suit fell within the scope of 8 and 9 Will. III., C. 11, and the question of damages was

one for jury and ought to be assessed on the breaches assigned and that the sum mentioned in the bond being a penalty judgment could not be entered under Order XIV.

The Court of Appeal (*A. L. Smith*, *Rigby*, and *Collins*, L.JJ.) held that the bond not being one for non-performance of a covenant, the suit on the bond did not come within the scope of the statute of Will. III, and that though various acts were prohibited, the payment of money being really conditioned on one event, that is, disobedience to the injunction, was really in the nature of liquidated damages and therefore judgment was rightly allowed to be entered under Order XIV.

---

*Action for malicious prosecution against a Corporation—Liability of a Corporation.*

**Cornford *v.* Carlton Bank, Ld.** [1899], I Q. B., 392.

In the eye of the Law, a Corporation is capable of malice and consequently an action for malicious prosecution will lie against a corporation.

*Edwards* v. *Midland Ry. Co.* [1880], 6 Q. B. D., 287, followed.

*The dicta of Alderson, B., in Stevens* v. *Midland Counties Railway*, 10 Ex., 352 *and of Lord Bramwell* in *Abrath* v. *North Eastern Railway Co.*, 11 Ap. Cas. 247, dissented from.

---

*Mortgage—Notice—Advances after notice—Subsequent Mortgage—Trust over on alienation—Words of Futurity—Retrospective operation.*

**West *v.* Williams.** [1899], 1 Ch. 132, C. A.

The facts of this case are shortly as follows: On the 24th of December 1895, the defendant, Walter Williams, borrowed £600 of the plaintiff and executed a mortgage of his life-interest under the will of his father, also a policy of insurance upon his own life. This mortgage-deed contained a covenant that until the 24th December 1896, or until the said Williams during the continuance of the mortgage should charge, assign or incumber the estate, notice of the mortgage should not be given to the trustees of the will. On the same date, another mortgage was executed to one Temple to secure an advance of £150, but this mortgage was made expressly subject to the plaintiff's mortgage. On the 2nd of April 1896 the defendant executed a further mortgage of the

same estate to his uncles to secure an advance of £2,297 immediately made and also the further advances of £200 per annum agreed to be made for five years from the 15th February 1896. As a part of this transaction and in consideration of the aforesaid annual payment of £200 for 5 years the defendant made a settlement of his life-estate by which he assigned it to defendants, Taylor and Miere, to be held in trust for himself for life or until he should assign charge or incumber. . . . . and after determination of the trust during his life, the trustees might in their discretion apply the income to the maintenance of the settlor, his wife, children, or remoter issue or his sister, her children or remoter issue. On the 7th July 1896, notice of this mortgage and settlement was given to the trustees of the will and at the time when such notice was given none of the parties to the last mentioned transactions had any notice of the prior mortgages. In fact, notice of the plaintiff's mortgage was given to the trustees of the will on the 8th June 1897, and on the 15th February, 1897, he wrote to the uncles offering to redeem their mortgage, but they refused to be redeemed. This action was then brought by the plaintiff to enforce his security by foreclosure or sale; for a declaration of the priority of the several mortgages; for redemption if necessary; and for consequential relief. The plaintiff admitted the priority of the mortgage to the uncles as regards all advances made by them before the 15th February 1897 when they for the first time became aware of the plaintiff's mortgage.

*Kekewich*, J., decided that the doctrine of *Hopkinson* v. *Rolt* was not applicable to the case since there was a covenant to make further advances and that therefore the uncles were entitled to priority not only in respect of advances made before notice, but also in respect of subsequent advances; that the settlement had priority over the mortgage, and that notwithstanding that the clause relating to the determination of the trust was grammatically applicable only to future alienations, yet by the ruling in *Metcalfe* v. *Metcalfe*, [1891] 3 ch. 1, the plaintiff's mortgage had the effect of determining the trust in favour of the settlor and that the discretionary trust had come into operation.

The Court of Appeal (*Lindley*, M. R., *Chitty* and *Williams*, *L.J.J.*) in reversal of the decision of *Kekewich*, J., decided as follows:—

1. A covenant to make future advances does not exclude the doctrine of *Hopkinson* v. *Rolt*, because the mortgagor is free to deal with the equity of redemption, notwithstanding this covenant and because on the discovery of a second mortgage in favour of somebody else the uncles could have

lawfully refused to make any further advances. Therefore, in spite of the covenant to make further advances, a prior mortgagee cannot as against a subsequent incumbrancer tack to his mortgage-debt money advanced to the mortgagor after notice of the second mortgage.

2. The clause in the settlement which provides for the subsistence of the trust in favour of the settlor "until he shall assign charge or incumber," refers only to future alienations and not to past ones. The plaintiff's mortgage, therefore, does not determine the trust in favour of the settlor.

The plaintiff's mortgage has priority over the settlement though notice of the settlement was given earlier, the reason being that, though the settlement was made in consideration of the annual payment of £200 by the uncles, the uncles themselves took no interest under it and the nephew in making a voluntary settlement in favour of persons who were *bonâ fide* purchasers for consideration, could not defeat a mortgage which he himself *had created.*

---

*Chose in Action—Assignment—Priority—Notice to all trustees existing at that date—New trustees after death or re-treatment of them all.*

*In re* **Wadsdate Britton** *v.* **Partridge,** [1899] 1 Ch., 163.

Where an assignee of an interest in a trust fund has perfected his title by notice to the trustees for the time being, he does not lose his right to priority over a subsequent assignee by reason of the fact that the prior assignee had given no notice to the new trustees appointed on death or retirement of the old trustees, while the subsequent assignee had so given notice. The decisions in *Timson* v. *Ramsbottam* [1837] 2 Keen 35 and *In re* Hall, [1880], 7, L. R., Ir. 180, distinguished on the ground that there the prior assignee had given notice to one only of several trustees and was postponed to a subsequent assignee who took his assignment after the death of that trustee and gave notice of it to the other trustees in existence at the *time.*

---

*Mortgage of real estate and life policy—Mortgagee taking possession of real estate—Redemption of real estate barred by Real Property—Limitation Act, 1874, S. 7.—Right to redeem policy—Analogy of the Statute.*

**Charter v. Watson,** [1899], 1., Ch., 175.

Where real estate and a policy of insurance had been mortgaged to secure a debt and the mortgage deed provided for the re-conveyance of the whole security on payment of the whole debt, it was held that there was one indivisible debt and one indivisible security, and that when the right to demand a re-conveyance of the real estate was lost under S. 7 of the Real Property Limitation Act, 1874, by reason of the continued possession of the mortgagee for more than 12 years without any acknowledgment of the mortgagor's title, the right to redeem and have a re-conveyance of the policy of insurance was also lost not on the analogy of the Statute, but because the unity of the security being granted it was impossible to separate the claim in respect of the policy from the claim in respect of the real estate as to which S. 7 of the Act of 1874 operated as a bar.

## JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the receipt of the following publications :—

*The Indian Stamp Laws*, by Mr. Desai Narotam, published by *The Tatva Vivechaka Press, Bombay.*—Price Rs. 5-8.

*Common Form Draftsman*, by Wild and Cooper, published by *Messrs. Butterworth and Co., 7 Fleet Street, London, E. C.*—Price S. 7/6 net.

The Bombay Law Reporter for April (*in exchange*).
The Albany Law Journal for April (*in exchange*).
The Calcutta Weekly Notes for April (*in exchange*).
The Allahabad Weekly Notes for April (*in exchange*).
The Green Bag for April (*in exchange*).
The Canadian Law Times for April (*in exchange*).
The Canada Law Journal for April (*in exchange*).
The Harvard Law Review for April (*in exchange*).
The Ceylon Law Review, Vol. I, No. 1 (*in exchange*).

***

*The Glass Eye Case:*—Judge Davis, at Cincinnati, on the 25th, decided the divorce case of Katherine Kraus against Charles Kraus, or the "glass-eye case," as it has come to be known, in favor of the wife.

The court holds that it is legal for women to attract mankind with "devices and attachments used to improve the work of nature," as the following excerpts from the decision will show: "It is not necessary for a woman, during courtship, to inform her intended husband of any device or attachment used to improve the work of nature in the construction of her face, form or figure. If a glass eye, purposely concealed before marriage, be fraudulent representation and a ground for divorce, why are not false teeth, false hair, or any other false article peculiar to the fair sex also be a ground for divorce?"—*Chicago Law Journal.*

***

*Nebraska Legislation*:—Nebraska has enacted that no female shall be employed in any manufacturing or mercantile establishment longer than ten hours per day; and that no child under the age of ten shall be employed in any such establishment, and no child under the age of fourteen except during the school vacation. It has also voted to create a commission to examine and license barbers, who must be above the age of eighteen, of good moral character, free from contagious disease, and with a record of two years' apprenticeship or one year in an approved school for barbers. All this will cost each barber five dollars, and his certificate may be evoked if he should be convicted of crime, become a drunkard, show gross incompetency, or become afflicted with a contagious disease:—*The Albany Law Journal.*

***

*Legal Laugh*:—An English pleader before Lord Ellenborough was inclined to be flowery. "My lord," he began, "it is written in the Book of Nature—" "What book?" inquired his lordship, taking up a pen. "The Book of Nature." "Name the page," said his lordship, dipping his pen in the ink to note it down:—*The Albany Law Journal.*

***

Barker, J.] RE JEWETT ARBITRATION. [Dec. 12, 1898.

*Arbitrator's fees.*

A man who chooses to act as an arbitrator cannot fix his fees upon the basis of the value of his services in his own special business for the time given to the arbitration. He need not act as an arbitrator unless he chooses, or he may stipulate as a condition to his consenting to act that his remuneration shall be at a fixed rate, but in the absence of that, if he chooses to act as an arbitrator, he must be contented with an arbitrator's pay. What that pay is depends upon the particular circum-

stances of each case. The expert, the professional man, the lawyer, surgeon or engineer as the case may be, who has been selected as arbitrator because the matters in controversy were such as his special training and education enabled him the more intelligently to determine, cannot be rated the same as one who has no such exceptional qualification. It is obvious also that in determining as to the reasonableness of the compensation regard must be had to the nature and importance of the matter in dispute, the amount of money involved, and the time necessarily occupied in the work :—*Canada Law Journal.*

***

The following are taken from an article "*Echoes of the Four Courts,*" No. 4, that appeared in the April issue of the *Lawyer and Magistrate* :—

In a sheep-stealing case tried before a judge, the offence was plainly proved, but a number of witnesses were called to depose to the good character of the accused. He summed up in a single sentence.

"In this case, gentlemen, the result of the evidence appears to be that the sheep were stolen by a man of most excellent character."

***

When the Judge of whom the writer is speaking was an advocate, a somewhat irritable judge on one occasion cut him short in the middle of a law argument, thickly interwoven with flowers of speech, by the impatient exclamation—"I have done my best, but I fail to understand a single word of your notice of motion."

"Not a single word, my lord; that is really most lamentable. Will you be pleased to permit me to the extent of my limited ability to endeavour to explain ?"

He read the notice over slowly, and with laborious expression.

"Sir – Take notice that on the 20th day of May, or on the first opportunity afterwards, counsel on behalf of the plaintiff in this action will apply to this honourable Court for an order that," etc., etc.

"Now, my lord, to proceed with my explanation. '*Sir.*' That, my lord, is the mode of monosyllabic address adopted by the solicitor for the plaintiff to the solicitor for the other side. It is curt, my lord, as the form provides, and indicates that the parties are now at arm's length; but not necessarily discourteous nor precluding the possibility of friendly private relations between the solicitors. '*Take notice.*' This, your lordship will observe, is in the nature of a warning. The object is that

the solicitor shall be prepared for the application, and, above all, that he shall have an opportunity to instruct and fee counsel to resist the motion if he considers it possible or advisable, or otherwise to appear on consent. '*On the 20th day of May,*' a day now passed, my lord, and, therefore unavailable for the making of this motion; '*or the first opportunity afterwards;*' that, my lord, is the present occasion. *Counsel on behalf of the plaintiff.*' That is the humble individual who appears before your lordship. '*Shall apply to this honourable Court.*' That is the learned and courteous judge whom I have the honour to address. '*For an order.*' That, my lord—

But the judge could not refrain any longer. "Go on with your motion," he said, joining in the general laughter, "I have learned my lesson."

---

*Notes of American Cases.*

A condition on the delivery of a note to the payee or his agent, that it shall take effect only when signed by another person, is held, in *Hurt* v. *Ford* (Mo.) 41 L. R. A. 823, in-effectual, but the delivery is deemed absolute.

***

Mere advertisers who place advertisements upon a signboard set up upon the roof of a building, by virtue of what is called a lease of part of the roof, but which does not give them possession of any part of the building, although they are required to keep in repair the portion of roof which they use, are held, in *Reynolds* v. *Van Bouren* (N. Y.) 42 L. R. A. 129, to be mere licensees who are not liable to a stranger for the falling of the signboard from the building during a high wind.

***

A judge who owns real estate in a city, that is taxable for the city's bonded indebtedness, is held, in *Meyer* v. *San Diego* (Cal.) 41 L. R. A. 762, to be disqualified to sit on a contest of the validity of a contract which will involve the creatain of a bonded debt of the city to a large amount, necessitating a special tax for forty years.

***

A grant of the exclusive privilege of entering station grounds to solicit passengers or baggage is held valid in *New York, N. H. & H. R. Co.* v. *Scovil* (Conn.) 42 L. R. A. 157, if its terms are not inconsistent

with the reasonable accommodation of the public. But the authorities on this subject are in conflict, as appears from the note to *Cole* v. *Rowen* (Mich.) 13 L. R. A. 848.

***

A provision that a life insurance policy shall not take effect until the payment of the first premium is held, in *Stewart* v. *Union Mut. L. Ins. Co.* (N. Y.) 42 L. R. A. 147, not to defeat the insurance, where a note for the premium was accepted and, at its maturity, a check taken, with the understanding that it would be satisfactory if it was paid the next week, although the insured died before the check was paid.

***

Condemnation of leased premises, without actual eviction, is held, in *Rhode Island Hospital Trust Co.* v. *Hayden* (R. I.) 42 L. R. A. 107, insufficient to relieve the tenant from liability.

***

Negligence in storing oil upon a station platform in violation of statue is held, in *Stone* v. *Boston & A. R. Co.* (Mass.) 41 L, R. A. 794, not to be the proximate cause of damage by fire caused by the dropping of match by a person delivering goods at the depôt, and who is not employed by the carrier.

***

The discretion of a receiver in respect to details in the management of a street railroad is held, in *Morley* v. *Snow* (Mich.) 41 L. R. A. 817, to extent to the adoption of metal safes for receiving fares into which the passengers are required to put the fare, while the conductor presses a button which rings a bell and registers the fare.

***

The offer of a reward for "the arrest and conviction" of an unknown perpetrator of a crime, is construed, in *Haskell* v. *Davidson* (Me.) 42 L. R. A. 155, so as to entitle a person to the reward when he obtains the facts to secure the arrest and conviction, without personally making the arrest.

***

The intention to make no provision for a child already born is held, in *Carpenter* v. *Snow* (Mich.) 41 L. R. A. 820, not necessary to be shown by the will itself, under a statute giving a child a right to share as in case of intestacy, if it appears that the omission was not intentional

But as to a child afterwards born the statute provides that such intention must "be apparent from the will," and this is not shown by merely giving all testator's property to his wife.

***

The novel question whether a bank holding certificates of deposit issued by another bank is a depositor is decided in *State Savings Bank* v. *Foster* (Mich.) 42 L. R. A. 404, holding that when such certificate does not represent any actual deposit, but only a credit on the books, against which checks or drafts may be drawn, the holder is not a depositor in the other bank within the meaning of a statute creating an individual liability of stockholders to the depositors.

***

Starting a train without waiting for a passenger to reach a seat after entering the vehicle is held, in *Louisville & N. R. Co. Hale* (Ky). 42 L. R. A. 293, to give no cause of action to a passenger who is injured thereby, unless there was some other reason for waiting than the fact that the passenger was a fleshy woman encumbered with a number of children,—at least when she had an escort with her. With this case is a note reviewing the other authorities on starting a car before a passenger obtains a seat.

***

A promissory note payable six months after date if the promisor is elected to a certain office is held, in *Specht* v. *Beindorff* (Neb.) 42 L. R. A. 429, to be lacking in the certainty necessary for a negotiable instrument, and also void on grounds of public policy as a wager on the result of the election.

***

A proprietor of a public resort who employed an independent contractor to make a balloon ascension to attract visitors is held, in *Smith* v. *Benick* (Md.) 42 L. R. A. 277, not to be liable for an injury to a visitor by a pole which fell because of the negligence of the balloonist while he was endeavoring to raise the pole for use in inflating the balloon.

***

The authorities which deny a right of action for mere fright or nervous shock are reinforced by *Braun* v. *Craven* (I. L. L.) 42 L. R. A. 199, which was a case of fright resulting in St. Vitus' dance, caused by violent conduct of a landlord suddenly appearing at the door of a room in which a woman was packing goods for moving.

***

Marriage on the high seas, where there is no law regulating the matter, entered into by persons who went there with the avowed purpose of evading the laws of their residence, is held, in *Norman* v. *Norman* (Cal.) 42 L. R. A. 343 to be invalid.

***

The right of a wife to an injunction against her husband's entering her dwelling house and eating and sleeping there is granted in *Lyon* v. *Lyon* (Ga.) 42 L. R. A. 194, in a case in which she had a pending suit for divorce from him on the ground of cruelty and habitual intoxication.

***

Death resulting from hernia which was caused by accident is held, in *Atlanta Accident Associotion* v. *Alexander* (Ga.) 42 L. R. A. 188, to give a right of action on a policy against accidents, although there was a provision against liability for injuries or death resulting from hernia or other disease.

***

A contract by an insurance agent to keep a person's property insured in his company is held, in *Ramspeck* v. *Patillo* (Ga.) 42 L. R. A. 197, to be invalid unless the company consents, because the agent cannot act in a double capacity, and this contract would require him to perform inconsistent duties and require the consent of both parties.

***

A provision that a life insurance policy shall be incontestable after one year is held, in *Clement* v. *New York Life Ins. Co.* (Tenn.) 42 L. R. A. 247, to be neither unreasonable nor contrary to public policy, but, while it is held applicable to fraud in procuring the policy, it is held inapplicable to the defense that the plaintiffs had procured the issue of the policy and its transfer to them as a speculation, and that it was therefore a gambling or wagering contract. With this case is an extensive note on incontestable life policies.

***

A policy omitting the usual suicide clause, and containing an "absolutely incontestable" clause is held, in *Patterson* v. *Natural Premium Mut. L. Ins. Co.* (Wis.) 42 L. R. A. 253, to cover a case of death by suicide.

***

A stipulation that a life policy is incontestable after three years from date and the payment of three full yearly premiums is held, in *Massachusetts Ben. L. Asso.* v. *Robinson* (Ga.) 42 L. R. A. 261, to be valid and applicable to a defense based upon misrepresentations or warranties, whether fraudulent or otherwise.

***

A municipal corporation enforcing a valid ordinance for vaccination is held, in *Wyatt* v. *Rome* (Ga.) 42 L. R. A. 180, to be exercising a governmental function, and therefore not liable for any damages caused by impure vaccine matter.

***

An ordinance forbidding the business of collecting, storing, and dealing in rags within thickly settled portions of a city is held, in *Com.* v. *Hubley* (Mass.) 42 L. R. A. 403, to be not unreasonable or in excess of the police power of the city.

***

Failure to fence or otherwise guard an open excavation or pond is held, in *Stendal* v. *Boyd* (Minn.) 42 L. R. A. 288, to give no right of action against the landowner for injury to children coming thereon without right or invitation, although they are attracted by the excavation or pond.

***

A theosophical corporation is held, in *New England Theosophical Corp.* v. *Boston* (Mass.) 42 L. R. A. 281, to be neither a scientific, benevolent, nor charitable institution, within the meaning of a statute respecting taxation.

***

Patent rights granted by the United States for an invention are held, in *People ex rel. Edison Elec. Illum. Board of Assessors* (N. Y.) 42 L. R. A. 290, to be exempt from the taxing power of a state.

***

A view by the jury of the premises where a crime was committed is held, in *Peopel* v. *Thorn* (N. Y.) 42 L. R. A. 368, to constitute no part of the trail, nor a taking of evidence; and therefore it is held lawful to permit the jury to make such view in the absence of the accused,—at least when he waives his right to be present. With this case is a very

extensive note marshalling the authorities on the subject of view by jury, and showing that there are several different theories entertained by the courts.

***

The right of a political convention to delegate its powor to a committee for the nomination of candidates is sustained in *White* v. *Sanderson* (Minn.) 42 L. R. A. 231, and the certificates of nominations are held properly executed by the chairman and secretary of the committee.

***

A conveyance bound by a river is held, in *Goff* v. *Cougle* (Mich.) 42 L. R. A. 161, to give title to the middle of the main channel, so as to include islands lying between that and the shore, in the absence of anything to show that the islands belong to the government. With this case is a note on the subject of title to land under water.

***

An unmeandered river of sufficient capacity to float logs, and down which logs are driven from time to time, is held, in *Willow River Club* v. *Wade* (Wis.) 42 L. R. A. 305, to be a public navigable streem. With this case is an extensive note on the question what waters are navigable.

---

## REVIEWS.

*Common Form Draftsman,* by Wild and Cooper, published by *Messrs. Butterworth & Co., 7 Fleet Street, E. C., London* :—Price S. 7/6 net.

We have received from that enterprising firm of Law Publishers—Butterworth & Co.—a copy of a new book entitled "The Common Form Draftsman." The forms contained in the book must be of great use in the every-day practice of a solicitor. We noticed sometime ago a book published by the same firm entitled "Kelly's Draftsman" containing numerous forms of conveyancing in a handy volume. The forms in this book, which relate to the practice of the Courts, may be regarded as a companion volume. The book cannot fail to be of use even in India where the practice in the Original Side of the High Court is modelled very much on that of the Supreme Court in England.

*The Law of Partnership*, by Arthur Underhill, M.A., LL.D., published by *Messrs. Butterworth & Co., 7 Fleet Street, E. C., London.*

We acknowledge with thanks the receipt of a small book on the Law of Partnership containing six lectures by Dr. Underhill issued by Butterworth & Co. These lectures contain the substance of the Law of Partnership elaborately treated in the well-known treatise on the subject by the present Master of the Rolls. Dr. Underhill has the reputation of being a good analytical lawyer, and his statement of the law in the shape of propositions accompanied by illustrations in the department of Torts and Trusts is highly prized in India. We welcome his lectures on the subject of Partnership—a department of law which is becoming every day of increasing importance in consequence of the great development of partnerships. We commend the book to all students of law and to all others who aspire to a sound knowledge of the principles of the subject.

---

*The Yearly Abridgment of Reports*, by Murray, published by *Messrs. Butterworth & Co., 7 Fleet Street, E. C., London*:—Price S. 12/6.

The yearly abridgment of reports, published by Messrs. Butterworth & Co., is a very useful publication. It must not be confounded with the annual index of the Law Reports, for it contains a full analysis of the cases alphabetically arranged together with an index of the subject-matter. There is also an alphabetical list of defendants which must be a valuable aid to the hunting-up of references.

---

*Quarterly Advance Sheets of the General Digest, American and English*, published by the *Lawyers' Co-operative Publishing Company, Rochester, New York*:—Price $1.

We have received the Quarterly Advance Sheets of the General Digest, American and English, No. 10. We have referred to a previous number and expressed our high admiration of the manner in which the work is done. We await the arrival of the permanent volumes with interest, and we venture to express the hope that they would prove a valuable addition to every legal library.

*The Indian Stamp Laws,* by Mr. Desai Narotam, published by *The Tatva Vivechaka Press, Bombay* :—Price Rs. 5-8.

We have much pleasure in introducing to the public this book entitled "The Indian Stamp Laws," by Mr. Desai Narotam. We commend the enterprise of the author in issuing this book so soon after the new Stamp Act has become law. Under the Act of 1899 he has pointed out the differences between that Act and Act I of 1879. Notes of cases are appended to the sections of the repealed Act which is printed *in extenso.* We think this arrangement is rather inconvenient. We suppose the author's excuse is that the notes had been printed before the passing of the new Act. The book cannot fail to be useful to the profession and to the public generally.

The Madras Law Journal.

PART V & VI.] MAY AND JUNE 1899. [VOL. IX.

## SIR ARTHUR COLLINS.

News has been received in Madras of the resignation by Sir Arthur Collins of the distinguished office of Chief Justice of Madras. He landed in this country towards the close of 1885 and has retired from his exalted station after filling it for the space of thirteen years and-a-half. It is meet that we should examine and appraise the work he has done during this period. It has been always the policy of this Journal not to indulge in criticism of the personal merits of our Judges. We have considered it extremely undesirable that expressions of want of confidence or disregard for the members of the highest judicial tribunal in the land should lower the dignity of the judicial office or weaken the confidence of the public in the judgments of that tribunal. Speaking with just pride of the work of Her Majesty's Judges in England, the Lord Chief Justice of England recently remarked in a speech at the Mansion House that it was one of the most significant, as it was one of the most happy, signs of their times, that when the Judge had spoken from the judgment seat, whether his decision might or might not run counter to popular feeling or popular prejudice, it was acquiesced in and treated by all the community with unfeigned respect. Fully recognising the necessity for such an attitude on the part of the public towards the judgments of the highest Court in the land, we have refrained from giving expression to convictions forced upon us as regards the merits of individual Judges, or their

fitness for the high office to which they have been called. In the recent despatch of Lord Elgin's Government regarding the status and salaries of Judges of Indian High Courts, attention is drawn to the importance of maintaining the efficiency of the Court, so that it might continue to command the respect and confidence of the people, especially, in a country like India. If we have very occasionally departed from this salutary rule of silence, such departure has been dictated by an anxious desire to give timely warning to the authorities of the possible danger to be averted. Sir Arthur Collins is no longer in our midst, and the fact that he is no longer actively connected with the discharge of judicial duties, renders it proper that a just estimate should be made of his judicial qualities and a fair judgment pronounced upon the work he has done. Such a judgment on our part, even though it may happen in some respects not to redound to the credit of the Judge that has left us, cannot affect the occupants of the Bench, or the dignity of the office of those who are engaged in the active discharge of judicial duties.

Since the constitution of the High Court there had been three Chief Justices before his arrival. Sir Colley Scotland came from the old Supreme Court to the High Court that replaced it. His mastery of legal principles and the soundness of his judgments won the admiration of the profession and the confidence of the public. Those were days when John D. Mayne and John Bruce Norton and others of the same calibre were the lions of the Bar. He was succeeded by Sir Walter Morgan prone to be lazy indeed, but gifted with a power of insight and expression which produced a profound impression on those who were privileged to hear the long oral judgments of his Lordship. Sir Walter Morgan retired, and his place was taken by Sir Charles Turner—a man of indomitable energy and possessed of a wonderful acuteness of perception which enabled him to do the work of two or three average Judges of the Court. It was, perhaps, a misfortune to Sir Arthur Collins to succeed them, for it was impossible that comparison should not infrequently be made between him and his predecessors by those that had seen the days when those Judges presided over the Court, or those who lived amidst the traditions of their greatness.

In an inaugural address delivered a few years ago by Sir Francis Jeune, the President of the Probate Division, as President of the Birmingham Law Students' Society, he observed: "Many of my audience know already, and the remainder will, I am sure discover, that practitioners and Judges are very much what they make each other. It is not apt to lead to satisfactory results when the advocate is much better equipped than the Judge. The eventual decision may not be wrong. Well-informed advocates are always considerate especially if their knowledge is not recent, and often have the gift of exposition. A Judge may discreetly hold his tongue, and allow wisdom to linger till knowledge comes. If Lord Campbell had not recommended such a method of enlightenment to Lord Chancellors, I should have hesitated to add that the faces of by-standers may be usefully consulted. But an argument under such circumstances is not edifying: certainly it is not likely to be productive of those phosphorescent hints and observations which sparkle along the path of an effective discussion and glimmer into the dark corners left for future litigants to explore. The spectacle of a Judge who knows much more than the advocate before him is more impressive; but I am not sure that the decision is not in greater peril." The spectacle of a Bench whose occupants fall below the level of the talent at the bar is not merely not edifying, but is apt to produce a feeling of want of confidence in the judicial administration of the country; and the Bench over which Chief Justice Collins generally presided was felt in many cases to be weaker than the forensic talent appealing to the judicial acumen of the Court. It is, therefore, the earnest desire of the whole people of this Presidency, not to speak of all branches of the profession, that Sir Arthur Collins's successor may raise the prestige and dignity of the Court to the level it used to maintain during the days of Sir Walter Morgan and Sir Charles Turner. Apart from the statement that the Bench and the Bar greatly re-act upon each other and the efficiency or inefficiency of the one produces a corresponding effect on the other, there is another important truth that the Chief Justice has a great influence for good or evil in moulding the judicial labours of his colleagues. If the Chief Justice does not attain to the highest standard of excellence, he is apt to pull down his colleagues to his level. But great indeed is the

praise due to those who rise above the atmosphere of dullness by which they are surrounded.

Sir Arthur Collins had no great reputation as a lawyer before he left England to occupy the office of Chief Justice of Madras. He appears to have attained the position of a leader of a circuit, but there was no evidence of high legal attainments or forensic ability. We have not been able to find any references to his forensic career in England, except that Mr. Montague Williams, in his book entitled "Leaves of a Life," refers to him in two places in a not very complimentary way. His name has figured very rarely in the English reports. He came to this country at a time of life which would have rendered the climate of this country, trying to the health and strength of many an ordinary Englishman. The period of his Chief Justiceship divides itself into two parts—the first runs up to the time of retirement of Mr. Justice (afterwards Sir George) Parker in the earlier part of 1896, and the second from that date up to the date of his own retirement. During the first period of his career, he had Sir T. Muthusami Aiyar and Mr. Justice Parker as his colleagues, in whose judgment and ability he had great confidence. In consequence of his reliance upon his colleagues, he very rarely troubled himself to take any prominent part in the work of the Court. After the retirement of Mr. Justice Parker, the feeling appears to have come upon him that he should assert his individuality to a larger extent than he had done before, and, although he did not write more judgments during the later period than in any corresponding part of the previous period, it must be confessed that he took a more active share in the moulding of the decision of the Court. We have specially gone through the reports of the period during which he has served as Chief Justice for the purpose of rectifying any possible error in the general impression that we have formed, and we are in a position to state that, except where he sat as a member of a Full Bench, His Lordship very rarely delivered a separate judgment, but was content to accept the judgments written by his colleague. Even the judgments which he has delivered sitting in Full Bench read like feeble paraphrases or abstracts of the more able judgments of some of his colleagues. It cannot fail to be astonishing to the lay-public

that search the reports as you may, there is hardly a judgment of striking ability or that can be quoted as a specimen of profound legal acumen or judicial talent. That he was inferior to several of his colleagues during the time that he has filled the office of Chief Justice is, we consider, no disparagement. Chief Justice Cockburn, or the late Lord Coleridge, who have distinguished themselves in their own way as among the most brilliant Judges that England has ever had, were not regarded in their days as equal to some of their colleagues in erudition or legal acumen or judicial insight. But they had redeeming qualities which raised them above their fellows and justified their choice by the authorities for the exalted station which they filled. During the long period for which he was connected with the Court he never sat as a Judge of first instance, possibly under the mistaken impression that the Chief Justice should be a member of the Court of Appeal. He has, it is true, presided at the Sessions, and the solemn trappnigs and ceremony and paraphernalia of the sessions court appear to have exercised considerable fascination upon his fancy. We have attended several trials over which he presided, and some of them have been sensational and have had every imposing circumstance and sign of grandeur attached to them, but we cannot recall to mind any charges to the jury which marshalled the facts of a complicated case inlogical array, which it should have been easy for him to deliver, if he had been a great *nisi prius* advocate during hisdays at the Bar. The jury have been treated to dull readings from the recorded evidence of witnesses with occasional remarks interspersed, that it was for the jury to say whether they believed this or that circumstance and a very prosy and altogether dull proceeding it was to those who were bound under the law to listen to them and to the naturally eager and expectant crowd of bye-standers that collect to watch criminal trials in Presidency towns. Sitting as a single Judge, except at the Sessions, necessitated close attention to the proceedings, for a judgment would have to be prepared and delivered by the presiding Judge which is subject to the risk of an appeal under the Letters Patent, which too sensitive natures cannot bear to look upon with equanimity.

It has always seemed to us that the system of two Judges sitting together to hear a case is fraught with the danger of redu

reducing one of the Judges to a condition of indifference, making him yield too readily to the stronger man and of making both the members eager to avoid a difference of opinion to be followed by a reference to a third Judge or by rehearing before a Bench of three Judges—a process the repetition of which is apt to tell very unpleasantly upon delicate natures. Such a system contributes to check the free and independent expression of opinion and to promote an eagerness to arrive at compromises which cannot but be detrimental to a sound and impartial administration of justice. It has seemed to us, therefore, to be a great merit in the system of English judicature that it generally insures the presence of three members in the Court of Appeal at the hearing of appeals from the Queen's Bench and Chancery Divisions of the High Court. As the system obtains in India, whether there is laziness or weakness or delicacy or a fear of repitition of work, it reduces the efficiency of the Appellate Bench.

Chief Justice Collins had one very valuable quality—a thorough impartiality and independence or freedom from class or sectional prejudice. There have been three branches of the profession practising before him, two of them mainly represented by his countrymen and the third by the sons of the soil, all eagerly competing with each other for professional success and pre-eminence. It is a great honor to the retiring Chief Justice that his strong sense of justice and impartiality enabled him to hold the scales evenly between them, never influenced by a desire to favor any one at the expense of the others. Indeed, we may go so far as to say that when he came to this country, he found one of the branches suffering under certain disabilities which he was anxious to remove during his term of office. We have no doubt that that branch will maintain a feeling of lively gratitude to the retiring President of the Court for all that he has done in the way of enabling them to compete on equal terms with the members of the other branches. He has raised the status of the vakils by giving them a professional costume. It was during his time that it was decided that vakils were competent to appear in appeals from the Insolvent Court. He is known to have fought strenuously for the office of Government Pleader in Madras being held by a vakil; he is believed to have entertained a strong inclination

to enroll vakils of some standing as advocates of the Court, and he has expressed himself more than once as unable to understand why vakils should not appear and act before the Insolvent Commissioner. But these undoubted acts of justice and impartiality cannot blind us to his shortcomings.

It has sometimes been said by those who really had no acquaintance with the subject that he was a great criminal lawyer. If this was a euphemistic way of representing the fact that his knowledge of civil law was not very deep, one might let the observation go unchallanged. But if the assertion is regarded as intended to convey the meaning, as the words obviously do convey it, that he is a master of criminal jurisprudence, we must confess we have seen no evidence of such mastery. He attached, it is true, a great importance to the speedy disposal of criminal cases, and during his tenure of office the criminal files of the High Court have been kept down at a low figure and most criminal cases were disposed of in less than three months from the date of institution in the High Court. It may be that he had a greater familiarity with criminal cases during his career in England, and had, therefore, a readier grasp of the facts of the criminal appeals that he had to dispose of than of civil cases; and he arrived generally at a fairly sound conclusion upon them.

He has been generally courteous in his treatment of the Bar and has displayed considerable patience in hearing the arguments at the Bar even though they happened to be somewhat tedious. He was saved from the danger which a Judge of great ability who fancies himself much more knowing than all the men at the Bar to whose speeches he has to listen is apt to fall into of rarely condescending to give a patient hearing. As he fittingly expressed it at the opening ceremony of the High Court of Justice in its present splendid habitation, it may be said to his credit that he endeavoured to do his duty "in fear of God and without fear of man." "He tried to administer the law," to quote his own words again, "without distinction of class, creed or race."

Mr. Richard Harris, Q. C., a well-known figure at the English Bar, says in a recent book which he has issued entitled "Her Majesty's Judges and their relation to Advocacy," that the one

great unchanging obligation of Judges is *impartiality*, and that a Judge should be "swift to hear, slow to speak and slow to wrath." Tried by these tests, Sir Arthur Collins may be pronounced a success.

---

## TOPICS OF MALABAR LAW.

### II.—*The Karnavan.*

We have now to consider the position of the Karnavan of a Marumakattayam Tarwad, and his rights and duties. We think that generally his position may be accurately expressed by saying that it is the same as that of a manager of a Hindu Mitakshara family with such modifications as the rule of impartibility necessarily involves. Like the manager of a Hindu family, his acts to be binding on the family must be those of a prudent manager acting *bonâ fide* in the interests of the Tarwad. But an alienation or an incumbrance created by him if not binding on the family is altogether void; while in the case of a manager of a Mitakshara family it would be binding on his share. Again, however beneficial or necessary an act done by the junior members may be in the interests of the Tarwad, it would be absolutely void as against the Tarwad even though all the members except the Karnavan may take part in it. The right of management is a birth-right and cannot be affected by the acts of junior members. The same is the rule in the case of an ordinary Hindu family governed by Mitakshara Law, the senior member alone has the right to manage: no one else, not even all the members put together have the right to represent the family in transactions with strangers. But since the Courts have recognized the right of a coparcener in a Mitakshara family to deal in any manner he chooses with his own share for valuable consideration, the acts of a junior coparcener, although they may not affect the family property as a whole, would affect the share of the coparcener who does the act. Whether the coparcener making an alienation be the manager or a junior member, the alienation will operate upon the share of the alienor. An alienee can enforce the alienor's equity to a partition of the property alienated. But as there are no individual shares in a Marumakkattayam Tarwad any alienation or incumbrance if made by any but the manager is

absolutely void (see 1 T. L. R., 88). It would be equally void even where it is the act of the manager unless it is one which a prudent man acting in his own interests would be justified in entering into or the alienee acted *bonâ fide* in the belief that the alienation is beneficial to the family.

We do not purpose to go through the whole field of the rights and duties of a Karnavan, as the matter has been treated at great length by several text-writers. We intend only to make a few observations to show wherein the statements of text-writers and of some decisions require to be modified or corrected. Mr. Wigram observes that the "Karnavan for the time being has an almost absolute control over the distribution of the family income and the family expenditure." Mr. Strange in his report as a Special Commissioner on the affairs of Malabar observes, "that the theory of a Hindu family in Malabar is that the head thereof has entire control therein." Mr. Mayne (see § 268 of his "Hindu Law and Usage") observes," that where the property is indissoluble the members of the family may be said to have rights *out* of the property than rights to the property. The head of the family is entitled to it in entire possession and is absolute in its management." These statements of the law are inaccurate and misleading. The Karnavan of a Tarwad has no more power than a manager of a Mitakshara family. He has not a greater beneficial interest in the Tarwad property than any other member of the Tarwad has in it—*Varanakot* v. *Varanakot*, I. L. R., 2 M., 328, at p. 331. But he is not a mere agent in the same manner as the manager in a Mitakshara family is not a mere agent. Neither of them can be controlled in his management by the other members of the family or Tarwad, provided the acts are those of a prudent manager. Their powers are not the result of delegation by the other members of the family or Tarwad and cannot therefore be restricted or affected by the dissent or the opposition of the other members (see *Iravanni Ravi Varman* v. *Ittapu Ravi Varman*, I. L. R., 1 M., 153, at p. 157). But equally in the case of the manager and the Karnavan, they have no right to appropriate the property to themselves except in so far as they are required for their legitimate expenses. When it is said, therefore, that a Karnavan has an almost absolute control over the distribution of the family income and the family expenditure, it should

not be understood that he is at liberty to do anything he likes with the income of the family property. He cannot give it away to strangers. He cannot use it for any but Tarwad purposes. He has no right to appropriate an undue proportion of it to his own use and he is bound to be fair and impartial in the treatment of the various members of the family; "equal dealing is the duty; all are eqally entitled to support"—*Koran Nair* v. *Chandan Nair*, 3 M. H. C. R., p. 295. He has no doubt a certain amount of discretion in dealing with the income. He is not bound to give an equal share to every one. He may consider the means and the circumstances and the resources of each member in determining what allotment should be made to him; and the Courts no doubt will deal with him generously in allowing him to exercise his discretion. But it is misleading to say that he has an almost absolute control over the distribution of the income. If he be grossly partial or unfair, or if he appropriates the income to his own use or uses it for other than Tarwad purposes, the Court can certainly take cognisance of it. Mr. Wigram laid down that a Karnavan may appropriate half the family income for his own expenses and for extraordinary expenses of the Tarwad. But the High Court held that no such rule can be adhered to—*Narayani* v. *Govinda*, I. L. R., 7 M., 352. In suits for maintenance there is no doubt that the Courts will decree an equal allowance to all the members unless there be circumstances for justifying a diminution; and the Karnavan is bound to act on the same principle. It may not be easy for the Court always to correct the Karnavan where he does not act properly. We shall consider hereafter what remedies the Court may grant against a Karnavan who acts improperly in the discharge of his duties. But one thing of all is certain that every improper act can be properly considered in a suit for removing him.

Mr. Mayne, when he states that the members of a Tarwad have rights *out of* the property than *to* the property, does not seem to make any difference between the position of the Anandravans of a Malabar Tarwad and the junior members of an ordinary Hindu family. For he proceeds to say: a family governed by Mitakshara Law is in a very similar position except as to their right to a partition and to an account as incident to that right. It is misleading,

if not fallacious, to say of the rights of the junior members of a Mitakshara family or a Marumakkattayam Tarwad that they are not rights to the property but rather rights out of the property. As pointed out by the High Court in *Varanakot* v. *Varanakot*, I. L. R., 2 M., 328, the Karnavan "is interested in the property of the Tarwad as a member of it to the same extent as each of the other members. All the members including the Karnavan are entitled to maintenance out of the Tarwad property. In *Tod* v. *Kunhamod Hajee*, I. L. R., 3 M., 174, *Turner*, C. J., and *Muthusami Aiyar*, J., in pointing out the distinctions between the incidents of property held by a Mitakshara family and that held by a Malabar Tarwad, observe that the law of the latter is less developed than that of the former, and seem to quote with approval the statement of Mr. Mayne which we have been commenting upon, and proceed to say: "The respect for elders which is a marked feature of all Hinduism is nowhere stronger than in Malabar, and consequently, although the individual interest of the manager of a Tarwad in Tarwad property is considerably less than that of a manager of a Hindu family, he has, in the management of the Tarwad property, somewhat larger powers than are accorded to a manager of a Hindu family. While equally with the manager of a joint Hindu family he is incompetent to aliene the estate without the consent of the other members of the Tarwad, except to supply the necessities of the Tarwad or to discharge the debts of the Tarwad; he can, not *only* make leases at rack-rents ordinarily for the term of five years for cultivation, but leases with fines repayable on the expiry of the terms in the nature of mortgages (*kanoms and mortgages otti*) in which little more than a right to redeem may be left to the family—*Edathil Itti* v. *Kopashan Nair*, 1 M. H. C. R., 122. We have not been able to ascertain that he has ordinarily power to make any other dispositions of property than such as are sanctioned by local usage, and although this Court ought, so far as it is justified in so doing, to construe liberally the powers which managers are competent to exercise so as to enable them to deal with Tarwad property as it would be dealt with by a prudent owner for the benefit of the family and to interpose no unnecessary obstacles to the employment of property in new industries, in so doing it undertakes what in some cases may be no easy duty—the determination of what acts

are and what are not beneficial; and it cannot lose sight of the fact that the office of Karnavan is fiduciary—*Koiloth P. M. Koran* v. *P. M. O. Nair*, 2 Mad. Jur., 117, and that a Court has no authority to confer on a Karnavan larger powers than are sanctioned by usage." We would respectfully submit that the right to make *kanom* and *otti* leases exists where it does, only because in the case of the famileis of the ancient landlords and other well-to-do families, that is the ordinary mode of enjoying property; and a manager, of course, would have power to do everything which is in accordance with the customary mode of enjoyment. It does not show that the powers of a manager of a Malabar Tarwad are higher than those of a manager of a Mitakshara family. Nor do we think that the Karnavan of every Tarwad would have the power to grant *kanoms* and *ottis*. Take for instance a family of agriculturists and not of landlords, we doubt very much whether the Karnavan would have the power to borrow money and to give away the lands on mortgage for a term of 12 years unless the money is borrowed for the benefit or the necessities of the Tarwad. The case cited by their Lordships, *Edattil Itti* v. *Kopashan Nair,* does not seem to bear out any general proposition affirming the Karnavan's right to make *kanom* or *otti* leases. *Scotland,* C. J., with whom *Strange,* J., concurred, observed in that case that an *otti* is different from a sale which, in their Lordships' view, requires the concurrence of the senior Anandravan. Regarding the power of a Karnavan to create an *otti,* their Lordships merely say that "a Karnavan may *singly* create it for proper reasons." The manager of a Mitakshara family, we think, has similar powers to create a mortgage *singly,* provided there is adequate family necessity or the transaction is for the benefit of the family. No doubt the proposition that a Karnavan may grant a *kanom* or an *otti* is often stated in general terms. (See *Varanakot* v. *Varanakot*, I. L. R., 2 M., at p. 330, and *Vasudevan* v. *Sankaran,* per *Collins,* C. J., I. L. R., 20 M., at p. 133). But the question was not really in issue in any of those cases, and we do not think such a right would be upheld in all cases without proof of necessity or manifest advantage to the Tarwad. As we have already observed, in the case of some families the usual mode of enjoyment is by granting *kanoms* and *ottis;* and in such cases the Karnavan's power to create such mortgages may be absolute as being an ordinary incident of management. But there is no justification

for assuming any general rule that mortgages of the sort may always be created by Karnavans without any special reason. Dr. Ormsby says: "that a mortgage for a fixed term is beyond the scope of the Karanavan's powers and requires assent (of the junior members) in the same manner as a sale," see § 23, p. 14 of the "Outlines of Marmakkattayam Law as administered by the Travancore High Court." "It has been repeatedly held by this High Court (Travancore) in a long series of decisions that a Karnavan cannot make an *otti* and *Kuli kanom* mortgage of property; (A. 126 of 1057, A. 155 of 1068)." He proceeds to say that alienations by way of ordinary mortgage may be made by the Karnavan alone if made for the benefit of the joint family. Sometimes the property of the family is said to be vested in the Karnavan, see *Varanakot* v. *Varanakot*, I. L. R., 2 M., p. 330, and *Vasudevan* v. *Sankaran*, per *Collins*, C.J., I.L.R., 20 M., 133. But this is no more true of a Karnavan than of a manager of a Hindu family. The property is vested, not in the manager alone, but in all the members of a family or Tarwad. No doubt, owing to the absence of the right to partition, the junior members of the Tarwad are in a large measure but impotent owners. But in the eye of law their ownership is as good as that of the Karnavan. As pointed out in *Tod* v. *Kunhamod Hajee* the Karnavan's office like that of the manager of a Mitakshara family is a *fiduciary* one, though both are more than mere trustees (see *Varanakot* v. *Varanakot*, I. L. R., 2 M., p. 328, inasmuch as besides their right of management they are also owners equally with the other members of the Tarwad or the family.

*(To be continued.)*

---

## SPENDTHRIFT LEGISLATION.

Notwithstanding all that has been said by theorists about the expediency of legislation being based solely upon an individualistic basis, legislatures have, as a matter of fact, in most countries proceeded on lines not acceptable to the thorough-going individualist. Legislation has been as often paternal and socialistic, as it has been individualistic. One of the many objects of the paternal solicitude of Government is the class of spendthrifts. Legislation about spendthrifts was as common in the ancient world as in the modern. The

motives with which such legislation has been undertaken and the principles which have regulated it have been shifting from time to time and in different countries. But the broad fact remains that, as a class, prodigals have in numerous countries been the subject of exceptional treatment. Prodigals were treated as a class of disqualified persons by the Roman Law, and they were liable to have the management of their estates taken out of their hands and curators appointed to act for them. The protection of the prodigal himself from the consequences of his imprudence and the protection of the rights of his relations appear to have been the considerations which led to their disqualification. A prodigal was supposed to be akin to an insane person and his disabilities were similar to those imposed upon lunatics. The Roman Law interfered to protect the estate of a prodigal on the same ground upon which it interfered to protect the estates of minors and lunatics. According to the Twelve Tables, the nearest agnate was appointed to manage the estate of a prodigal who had been interdicted upon an inquisition held for the purpose. The prodigal was incompetent to alienate his property or enter into any contract or do anything which would have the result of diminishing his estate. Similar legislation seems to obtain on the Continent of Europe.

In England, legislation in favor of prodigals never found favor, and it was considered to be more advantageous to the country to promote the free alienation of property. On the other hand, in America, laws have frequently been passed for the protection of the estates of spendthrifts, and in some of the statutes passed towards the end of the last century, the word "*spendthrift*" is defined to include every person who is liable to be put under guardianship on account of excessive drinking, gaming, idleness or debauchery. The chief motive which inspired this legislation was the fear that the spendthrift might expose himself and his family to want and might become a charge upon the town where he was residing. A complaint may be made by the prodigal's relations, or by the overseer of the poor of the town where he is residing, or by certain other classes of persons named in the statutes. After the appointment of a guardian for the estate, the spendthrift could not make any transfer of his real or personal estate and could not enter into any contract with reference to it. In India also, laws have been introduced in different parts of the country by the British Government

with the object of protecting large landholders who have encumbered their estates. The reasons which have influenced the English Government are wholly of a different character to those that have led to such legislation in America. There is no danger in this country of a burden being thrown upon the local authorities, but the Government deems it necessary to undertake such legislation, partly from motives of commiseration towards the aristocracy, partly from an apprehension of the evils that might arise to the country by the disappearance of the class of great landlords, and partly from a perception of the advantages that may be derived by the State by the maintenance of a wealthy landlord class.

From an abstract point of view, numerous objections will readily suggest themselves to any legislation which is intended to save people from the consequences of their own imprudence. It is to the interest of society that property should pass from the hands of imprudent proprietors to those who are likely to be better able to take care of it. To protect an improvident class from the consequences of its conduct would have the effect of offering a premium to the continuance of the habits which led to its embarrassment. Where a prodigal can be placed under a curatorship at the instance of his relations or the civil authorities, the system is open to the objection of undue interference with individual liberty. Where, on the other hand, the prodigal can himself apply to be declared one and to have the management of the estate committed to the care of the Government, the system is open to the objection of involving an interference with the vested rights of creditors. The various enactments which have been passed in British India in protection of the owners of incumbered estates are all open to this objection. There are, however, considerations of great weight in favor of legislation on behalf of the proprietors of large estates. The landed aristocracy of a country is the class most interested in the stability of the Government and in the maintenance of peace and order. Their authority and influence are factors which tell against any violent upheaval of the existing order. A wise Government will not do or permit anything which may have the effect of weakening that authority and influence. Apart from the considerations of sentiment and political expediency, there are other considerations of public policy entitling them to considerate treatment. The hereditary feelings of attachment between the zemindar and his ryots are

likely to dictate a more liberal attitude towards the ryots than is likely to be taken by persons who own no ancient ties with the peasant class. Yet more important is the economic advantage to the state of a rich landlord class. We have no desire to enter into the vexed question of the relative superiority of peasant proprietorship or the system of large landed estates. But having regard to the fact that in this country we have a combination of both the systems and that India is mainly an agricultural country the possibilities of initiating agricultural improvements on a large scale ought not to be lost sight of. There are numerous other directions in which a wealthy aristocracy, if only properly educated, can be made to promote the material and moral interests of a country in a manner in which those interests cannot be promoted in a community destitute of a wealthy class. Such are the considerations which have led to the enactment of laws for the relief of encumbered estates. These various enactments do not, however, seem to be efficient enough to attain the objects above mentioned. If the prevention of the disintegration of ancient estates is desired, a more radical change is necessary for the purpose. The mere deprivation of the management of the estate and the imposition of disabilities during the period of management will not be sufficient to achieve this object. The joint-family system which obtains in India and the recent decisions of the Privy Council recognising the right to make alienations of zemindaries *inter vivos* and by will have gone a long way towards the disruption of zemindary estates. A zemindar who is disposed to be extravagant can still indulge in extravagance by selling portions of his estate; and this result is more likely to follow hereafter, as the difficulties placed in the way of creditors are likely to deter them from advancing moneys by way of loans. Unless some restraints upon their powers of alienation are placed upon the owners of zemindaries, half-hearted measures like the recent Act (Madras Act IV of 1899) to amend the Court of Wards Regulation must be defective. This Act makes no attempts to save estates, the owners of which are not willing to make an application to be declared incapacitated owners.

We shall now notice some of the principal provisions of the new Act in regard to spendthrifts declared incapacitated upon their own application and to persons already subject to the jurisdiction of the Court of Wards under Regulation V of 1804. While

the Regulation merely prevented incapacitated persons from taking charge of, or administering, the affairs of their property, the new Act imposes greater disabilities and declares them incompetent to enter into any contract involving any pecuniary liability, to mortgage, charge, lease or alienate their property, or to grant receipts of rents and profits arising from the property. Ss 28 to 35, introduced by the new Act, are of general application to all classes of wards subject to the Court of Wards. The object of these provisions is the liquidation of the debts and liabilities which may affect the estate of the wards. The Collector is empowered to publish a notice requiring all persons having pecuniary claims, whether immediately enforceable or not, against the ward or his property to furnish particulars of the same to the Collector within six months from the date of the notice. Notice is also required to be given by registered post to every person who is known to the Collector as having any pecuniary claims against the ward or his property and of whose address he is aware, or is credibly informed. If the claimant satisfies the Collector that he had sufficient cause for not notifying to the Collector within six months, he may be allowed by the Collector to present his claim within a further period of six months. The obligation to notify claims to the Collector does not extend to the claims of Government or local authorities, or to claims for maintenance, or wages, or salaries due to servants.

The consequence of an omission to notify claims to the Collector is that the claim will cease to carry interest from the expiration of six months after the date of the notice, and will not be paid until after the discharge or satisfaction of the claims notified or admitted under sub-section 1 of S. 30. This is a somewhat drastic provision, and if it could be ensured that every creditor or claimant should be informed of the notification, there might not be much hardship. But as the Collector can only inform persons of whose claims and address he is aware, and as the Act provides no machinery for the supply of the necessary information to the Collector, there is a likelihood of persons having claims against the estate not receiving notice of the notification. The Act, no doubt, provides for the publication of the notification in the *District Gazette*. But a publication in the *Gazette* is nothing more than a farce and a useless, though perhaps, unavoidable formality. Even the *Fort St.*

*George Gazette,* which is published for the whole Presidency, is seldom read by any except officials and the *District Gazettes* are still less read by non-officials. The presumption that publication in the *Gazette* is publication to all concerned is nothing more than a fiction, and sometimes a convenient fiction. Publication in the newspapers would be much better calculated to achieve the object, and, though the Court of Wards is at liberty to adopt this method, it would have been better, if it had been specifically prescribed. The best method of notification, however, is by sending a separate notice to every individual creditor. In this connection, we must express our regret that the amendment moved in Council to the effect that a person presenting an application to be declared incapacitated should be required to submit a verified schedule of his debts and liabilities, was not carried. A similar provision is to be found in all the other incumbered estates, Acts in India, and we do not think that the fear expressed by the official members of such a provision deterring persons from applying for relief and of its being likely to expose them to the risk of a prosecution for perjury is well-founded or sufficient to overweigh the advantages which would have resulted from the adoption of the amendment. A person who finds himself involved and applies under the Act to be declared incapacitated holds a position analogous to that of an insolvent, and as an insolvent is required to submit a verified schedule of his debts, we see no reason why the new class of incapacitated owners should not be obliged to furnish a schedule of debts and liabilities. After the claims have been notified by the creditors, the Collector is to make such enquiry as he thinks fit and decide which claims are to be allowed in whole or part and which claims are to be disallowed.

Claimants, however, are not debarred from instituting proceedings in court in respect of their claims. The Governor in Council may declare by notification in the Gazette that execution of decrees passed by civil courts which are capable of execution by sale of any immoveable property shall be transferred for execution to the Collector of the District in which the property is situated. Upon this notification, the Collector can act under the provisions of Ss. 321 to 325 of the Code of Civil Procedure. The most drastic provisions of the Act, however, are Ss. 39 to 41; sections 39 and 40 involving a serious interference with the rights of creditors and lessees and S. 41

involving an interference with the rights of the heirs of incapacitated owners. Under S. 39, a mortgagee in possession may be called upon by the Collector to deliver up possession of the property at the end of the current year, and on refusal may be summarily ejected therefrom. Under S. 40, if a lessee holding under a lease granted by the incapacitated proprietor within three years of the assumption of management by the Court of Wards is found not to have paid sufficient consideration for the lease, the Collector can, after the lapse of two years from the date of notification, determine the lease at the end of the current year, unless the lessee pays any further consideration that may be demanded by the Collector. A lessee who is dissatisfied with the decision of the Collector is at liberty to establish the validity of his lease in a civil court. If the lessee does not pay the additional consideration required, the Collector can summarily evict him without resorting to a civil court. These provisions involve a serious violation of the vested rights of creditors, and while on the one hand they will render it more and more difficult for zemindars to obtain loans, it is very doubtful on the other, whether these stringent provisions will result in any considerable advantage to the zemindars or to the public. For our own part, we think that instead of leaving it to the Collector to summarily determine the question and drive the creditor or lessee to the civil courts, it is the Court of Wards that should be obliged to go to the civil courts to have it declared that the mortgage or lease is not binding whether as an unconscionable bargain, or upon any other ground recognized in law or equity. While a proprietor may be declared incompetent to enter into future transactions affecting his estate, we think it will be gross injustice to enable him to break his contracts and defraud his creditors and lessees. After the debts affecting the estate have been cleared, the Court of Wards may restore the estate to a person declared incapacitated upon his application, if it is satisfied that he is competent to administer the affairs. This we consider a wholesome provision, for if the estate is restored to an owner who has not given up his improvident habits, the estate would be again plunged in debt and all the trouble undertaken by the Court of Wards would be thrown away. If the debts and liabilities are not liquidated during the life-time of the incapacited person, the Court of Wards may continue the superintendence on behalf of his legal representative even though the latter may be

under no disqualification. This provision also appears to be of a drastic character. Unless the legal representative is incompetent to manage his affairs, there is no more justification for withholding his estate from him and continuing the management of the estate, than there would be for taking charge of an estate merely on the ground that a person's ancestor was a spendthrift and had plunged the estate into debt. We are aware that some reasons may be urged in favor of the provision in the Act. It may be that the Court of Wards has put in hand schemes for the liquidation of the debts, and that the schemes may not have been completely carried out. It may be of some advantage to the heir-at-law of the incapacitated proprietor to have the scheme completely carried out and have the estate freed from debts. These advantages, however, are in our opinion sufficient to justify a temporary confiscation of the inheritance. How far this Act will succeed in preventing the disruption of zemindaries is a matter which the future must decide.

## NOTES OF INDIAN CASES.

**Dhuramsey** *v.* **Ahmedbhai,** I. L. R., 25 B. 15. In the case of a lease for a certain period where rent had been paid in advance and premises had been burnt down subsequently, the Transfer of Property Act, S. 108 cl. *e* enables the lessee to avoid the lease. But the further question, whether the lessee is entitled to claim the refund of any portion of the amount advanced, is not touched by the Act. It appears to us that *Candy.* J was right in declining to follow *Paradine* v. *Jane,* Aleyn 26 and other English cases decided upon that authority. S. 65 of the Contract Act enables the Court to adjudge a return of the advantage or such part thereof as may be just by the lessor.

**Ningawa** *v.* **Bharmappa,** I. L. R., 25 B. 63. The decision in this case raises a question of some interest, whether a statement by a deceased owner of adjoining land in a mortgage of that land that it was bounded on one side by so and so's property is a statement against his pecuniary interest, and, therefore, admissable under S. 32 of the Evidence Act. The learned Judges who decided the case are of opinion that such statement is evidence. They begin by saying that the statement of indebtedness of the mortgagor is against interest and therefore relevant. But it does not appear to us to follow that a statement that it is bounded on one side by somebody's property is evidence of that person's ownership. It appears to us that under cl. 3 of S. 32 the state-

ment sought to be made evidence should itself be against the interest of the person making it and not merely connected in some way with a statement against interest. The language of the section in cls. 2 and 5 is different. The *Rajah Leelanund Singh* v. *Mussamut Lakhputtee Thakoorain* 22 W. R. 231 has really no bearing on the present question, becaue in that case the statement itself to be put in evidence could well be regarded as against the interest of the person making it. *Hiham* v. *Ridgeway* would seem rather to support the decision of the Court. But as observed in Smith's Leading cases at p. 331 there seems no reason for admitting the statement as evidence of facts as to which the improbability of its falsehood does not exist. Even in England disconnected facts though contained in the same document or statement are inadmissable. See *Doe* v. *Bevis*, 7. C. B. 456 and Ameer Ali's Evidence, p. 231. The language of cl. 3 has to be stretched somewhat to justify the conclusion of the learned Judges.

**Sadashive** *v.* **Trimbak,** I. L. R., 25 B. 146. This is as regards the nature of a minor's contract, whether it is void or voidable. There is a full discussion of the authorities, the majority being inclined to take the view that the contract is voidable. We have discussed the question in a critical note in the 1st volume at p p. 262 to 270 and we see no reason to alter the conclusion there expressed. The Madras and Calcutta High Courts, have taken the same view as the Bombay High Court on the question.

## SUMMARY OF RECENT CASES.

*Landlord and tenant—Distress for rent—Goods impounded on the premises—Absence of the man left in possession—Removal of goods —Action for pound breach.*

**Jones** *v.* **Biernstein** [1899] 1 Q. B., 470.

Where the man left in possession of goods distrained and impounded on the premises for rent due to the landlord, left the premises and did not return till two days later, and the true owner of the goods during his absence entered the premises and removed the goods, it was held by the Court of the Queen's Bench that when once goods were distrained and impounded, they came into *custodia legis*; that so long as the distress was not abandoned the mere fact that the man was not in actual possession of the goods did not take them out of the custody of the law; and that the remover of the goods, true owner though he was, was liable to an action for pound breach.

*Company—Illegal distribution of capital by directors—Directors ordered to replace money—Right of directors to be recouped by shareholders.*

**Moxham v. Grant** [1899] 1 Q. B., 480.

Where the directors of a company who carried on the business of owning shares in ships distributed among the shareholders the insurance money realised on the loss of a ship, but were subsequently on the winding-up of the company ordered by the Court to replace the money on the ground that the distribution not having been sanctioned by the Court of Chancery was *ultra vires*; in an action by the directors to recover the money from the shareholders it was held by the Court of the Queen's Bench that the directors who made the payment under a mistake of the company law were entitled to be indemnified by the shareholders, and that the shareholders who knew that it was the insurance money they were receiving and who alone benefited by the payment could not in justice resist the claim.

---

*Evidence—Prisoners jointly indicted—Admissibility of evidence—Case stated on behalf of one prisoner—Quashing conviction of the other.*

**The Queen v. Saunders** [1899] 1 Q. B., 490.

Two prisoners were jointly indicted for conspiracy. One was represented by counsel, while the other was not. The counsel for the first prisoner objected to two questions put to a witness by the counsel for the prosecution; but the objection was overruled by the Chairman. However, at the request of the counsel, he reserved for the opinion of the Court the question whether the questions were rightly permitted and whether if not the conviction could still be sustained. The Court rejected the evidence admitted as hearsay and held that the conviction could not be sustained, as inadmissible evidence had been left to the jury. Then the further question arose as to whether the conviction of the other prisoner on whose behalf no question had been stated should be left alone or quashed. It was held that the Court had jurisdiction to quash the other conviction also, because the question of the admissibility of evidence was common to both prisoners and because the convictions of the two prisoners stood upon the same grounds and must stand or fall together.

---

*Practice—Interpleader—Bailee estopped—'Jus tertii.'*

*Ex parte* **Mersey Docks and Harbour Board** [1899] 1 Q. B., 541.

A certain person lodged goods with the Board who held them only in the character of wharfingers and pledged the goods to a certain bank to secure advances made by them; and it had been transferred into their names in the books of the Board. Subsequently he managed somehow to get dominion over the goods and proceeded to pledge the goods to secure advances made by another bank. But before this latter bank made the advances, an officer of the Board wrote to them to say that the goods were held to their order. In an action by this latter bank against the Board for wrongful detention and damages, the defendants successfully applied for an interpleader summons. The bank appealed against the order. It was held by the Court of Appeal that the conditions necessary under Rules 1 and 2, Order LVII, for the claim of relief by way of interpleader were present in the case (namely, the party was under a liability for goods, in respect of which two persons were about to sue; the applicant claimed no interest in the subject-matter; the applicant did not collude with any of the claimants; and he was willing to dispose of the goods as the Court should direct); that therefore an order directing the banks to interplead and establish their claims was rightly made, notwithstanding that the Board might be estopped by their letter from denying the claim of the bank; and that if the bank had any claim upon the letter, they were at liberty to sue for the value of the goods if they were defeated on the issue and for any other damages arising from the conversion of the goods by the Board.

---

*Sale of Goods—Possession of bill of lading with the sellers' consent—Non-acceptance of Draft—Transfer of the bill to sub-vendee—Stoppage in transit.*

**Cahn and Mayer *v.* Pockett's Bristol Channel Steam Packet Company, Limited** [1899] 1 Q. B. 643 C. A.

Two questions were raised in this case—(1) whether when a seller of goods sends the bill of lading and a draft for the price under cover of one letter, the buyer might without accepting the draft take possession of the bill of lading and confer a valid title on a purchaser who takes it in good faith and without knowledge of the want of authority of his vendor to deal with the goods and the bill; (2) and whether the seller could stop the goods in transit as against the *bonâ fide* sub-purchaser.

It was held that though according to *Shephard* v. *Harrison*, L. R., 5 H. L., 116 the property in the goods could not pass to the buyer till the draft was accepted, the bill of lading having passed into the possession of the buyer *with the consent* of the seller, a valid title could be passed to a *bonâ fide* sub-purchaser by a transfer of the bill of lading under the express provisions of section 25, sub-section 2, of the Sale of Goods Act, 1893.

As to the other question whether even if a valid title could and did pass to the sub-purchaser under S. 25 of the Sale of Goods Act the seller could stop the goods in transit, it was held that the combined effect of S. 2, Sub-S. 1 and S. 10 of the Factors Act, 1889, and the Act of 1893 was to put an end to the right of stoppage *in transitu* under circumstances such as those of this case and that S. 61 Sub-S. 2 of the Act of 1893 did not preserve to the seller the common law right of stoppage which he had lost under the provisions above mentioned.

---

*Evidence—Title to commonable lands—Reputation, admissibility of—Deposition in suit to perpetuate testimony—Survey and report made under statute.*

**Evans *v.* Merthyr Tydfil Urban Council** [1899] 1 Ch. 241 C. A.

Where a question was raised as to whether certain lands were common lands, or were subject to commonable rights of either of two parishes, it was held that having regard to the general interest in the locality on such a question, evidence of reputation was admissible. The explanation of *Earl Dunraven* v. *Llewellyn*, 15 Q. B., 791, in *Warrick* v. *Queen's College, Oxford*, L. R., 6 Ch., 716, approved.

The mere fact that at the instance of a predecessor in title of a party to a suit, a deposition was taken in order to perpetuate testimony does not, unless it was in any way used or adopted by him, amount to an admission so as to be admissible against the party to the suit. And the fact that the deposition was found to be unsealed is not evidence of any user or adoption by the predecessor, as the deposition might well have been opened for other purposes.

Even though according to the dictum of Lord Chelmsford, L. C., in *Phillips* v. *Hudson*, L. R., 2 Ch., 243, a survey and a report prepared for the Crown are inadmissible on the ground that they were made for the Crown as private owner, yet when they were made pursuant to a

public statute, they satisfy the tests of a "public" document laid down by Lord Blackburn in *Sturla* v. *Freccia*, 5 A. C., 623, and are admissible in evidence as such.

---

*Covenant in restraint of trade—Reasonable protection of the covenantee—Public policy.*

**E. Underwood & Sons (Ld.) v. Barker** [1899] 1 Ch. 300.

The defendant agreed to serve as clerk and foreman under the plaintiff who carried on an extensive trade as hay and straw merchants in the United Kingdom, France, Belgium, Holland, and Canada. The written agreement entered into between the plaintiffs and the defendants provided that the defendant should not for the space of one year next after his leaving or being dismissed carry on the business of hay and straw merchant or enter into the service of or act as agent for any person or persons carrying on the business of hay and straw merchants in the United Kingdom, or in France, or in the Kingdom of Belgium or Holland, or in the dominion of Canada. The defendant within twelve months after he left the service of the plaintiffs entered the service of a hay and straw merchant in London. The plaintiffs applied for and obtained an injunction restraining the defendant from in any way acting for the rival merchant. The defendant appealed.

It was held by *Lindley*, M. R., and *Rigby*, L. J., (*Vaughan Williams*, L. J., diss.) that it was necessary for the protection of the plaintiffs that the rival merchants should not know to whom they sold their hay and where they got it from, that therefore the covenant restraining their clerk and foreman who was in their trade secrets from serving under rival merchants for the space of one year was certainly reasonable, that a covenant in restraint of trade which is reasonably necessary for the protection of the covenantee should not be held void on the ground of public policy unless some specific ground could be established, that no specific ground having been established in this case the covenant was not void on the ground of public policy, and that even if the restraint be held to have an unreasonable extension in space, yet the agreement as to the foreign countries being severable from that as to the United Kingdom, the restraint was valid at least so far as it related to the United Kingdom (See *Baines* v. *Geary* (1887) 35 Ch. D. 154 and *Nordenfelt's Case* (1893) 1 Ch. 630. They therefore granted the injunction.

On the other hand *Vaughan Williams*, L. J., dissenting held that the doctrine that all covenants in restraint of trade are *primâ facie*

unreasonable had not been rescinded by recent decisions, that the reasonableness of a restraint could not be determined without considering whether the restraint is injurious to the public, that having regard to the interest of the public in freedom of trade and in the liberty of the covenantor to earn a livelihood in any lawful industry, the restraint imposed upon the defendant, though only for a twelvemonth, was unreasonable and invalid and could not be enforced.

---

*Will—Construction—Gift to son, his wife and children—Re-marriage of son after date of will—Claim of the second wife.*

*In re* **Drew—Drew** *v.* **Drew** [1899] 1 Ch. 336.

A testator devised property to his son, his son's wife and children in succession. The wife who was living at the date of the will subsequently died and the son married again. The question was whether this wife who survived him was entitled to take a life-estate under the will. It was contended for her that the will devised property to the sons of his son who should be living at the date of his son's death without any restriction that the grandsons were to be by the son's wife living at the date of the will, that therefore a second wife was equally within the contemplation of the will, and that the following proviso in the will showed that the benefit of the will was not confined to any particular wife of the son. The proviso ran as follows: "And after determination of the estate so given . . . to my said son . . . . upon trust that the said trustees . . . . . do and shall retain and keep . . . . the surplus rents and profits . . . . . and the interest, dividends and income of the one-thirteenth share hereinbefore directed to be invested for my said son . . . . *and his family* and every part thereof for the purpose of applying the same in or towards the maintenance . . . . of . . *Drew*, *his wife and children* at such time or times . . . . ." Stress was laid on the italicised part of this proviso to show that the life-estate was not confined to the wife who was living at the date of the will. Mr. *Stirling*, J., held that there was enough in the will to rebut the presumption that the gift of the life-estate was confined to the wife living at the date of the will and that the widow was entitled.

---

*Practice—Infant—Jurisdiction to order infant to pay costs.*

**Woolf** *v.* **Woolf** [1899] 1, Ch. 343.

In this case it was held that an infant defendant, who was restrained by injunction of Court from representing falsely that the business

carried on by him was in any way connected with that carried on by the plaintiffs, might lawfully be directed by the court to pay the costs of the action.

*Chubb* v. *Griffiths* [1865] 35 Beav. 127 and *Lempriere* v. *Lange* [1879] 12 Ch. D. 675 followed.

---

*Will—Power of appointment—Exercise of power—Construction.*

*In re* **Jack—Jack** *v.* **Jack** [1899] 1 Ch. 374.

A testator bequeathed £15,000 in trust to a woman for life, and on her death to her three children in such shares as she should appoint by will or codicil and in default of appointment to them in equal shares. The woman after making appointment as to four-sixths of the fund declared as follows: "I make no appointment of the other two-sixth parts of the said sum of £15,000 as *I wish them to pass directly to my said two daughters* so as to give them an immediate vested and disposable interest therein, and *I also declare that neither my son nor his children shall take any share or interest in the said unappointed parts of the said trust funds.*"

The question was whether there was any appointment of the two-sixths by implication, whether, if not, the parties should not be put to an election, and whether having regard to the last clause the appointment of the son to a one-third share in the first clause was not conditioned upon his not claiming any share in the unappointed parts of the fund. *Romer*, J., held that the testatrix herself having declared that the two-sixths were unappointed, he could not imply any appointment of them, that no question of election could arise in the case, and that, lastly, the condition could not be *implied* as the effect of such implication would be to defeat the claims of the son's children in the event of the son (who had only a life-interest, the residue going to his children after his death) laying claim to the unappointed parts of the trust fund.

---

*Practice—Separate causes of action—Same defendants—Same transaction—Company—False statement in prospectus—Repudiation after action.*

**Drincqbier** *v.* **Wood** [1897] 1 Ch., 393.

Where a number of persons who were deluded into taking debentures by the mis-statements of the directors in a prospectus jointly brought a suit for damages against the directors, it was held that the causes of action were the same and arose out of the same transaction and against the same defendants and that the action was therefore rightly instituted.

Section 3 of the Director's Liability Act, 1890, which provides that director shall not be liable to an action for damages for misrepresentations in a prospectus, if the prospectus was issued without his knowledge, and, if as soon as he came to know of its issue, he gave public notice that it was issued without his knowledge or consent, does not exonerate him from liability, unless he repudiated the prospectus *before the date of the action.* Therefore, when an action has been already brought for damage, it is too late to repudiate; and the statement of defence is not a *reasonable public* notice of repudiation within the meaning of the section.

---

*Gift—Equitable assignment—Banker's deposit receipt—Indorsement and delivery—Donee executor.*

*In re*: **Griffin—Griffin** *v.* **Griffin** [1899] 1 Ch. 408.

Where the owner of a banker's deposit receipt indorses and delivers it to a person with the intention of making a gift of it to him, he has done everything required to be done by him in order to transfer the debt, and there is a valid equitable assignment of the amount held by the bank (*Milroy* v. *Lord*, 1862, 4 D. F. and J. 264.) See also *Fortescue v. Barnett*, 1834, 3 My. and K. 36, 43, and *Donaldson* v. *Donaldson*, 1854, Kay, 711, 719.

And if anything remained to be done in order to complete the gift, the appointment of the donee as executor of the donor perfects the gift.

---

## JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the receipt of the following publications:—

The Bombay Law Reporter for May and June (*in exchange*).

The Albany Law Journal for May and June (*in exchange*).

The Calcutta Weekly Notes for May and June (*in exchange*).

The Allahabad Weekly Notes for May and June (*in exchange*)

The Green Bag for May and June (*in exchange*).

The Canadian Law Times for May and June (*in exchange*).

The Canada Law Journal for May and June (*in exchange*).

The Ceylon Law Review, Vol. I, No. 2 (*in exchange*).

***

*Judges who are entitled to retire*:—Mr. Justice *Day*, who last Saturday completed seventeen years of judicial service, is one of the five occupants of the Bench who are entitled to retire on pensions. The Master of the Rolls has occupied a seat on the Bench for twenty-four years, Mr. Justice *Mathew* for eighteen years, Mr. Justice *North* for seventeen years, and Lord Justice *Smith* for sixteen years. Mr. Justice *Wills* will shortly be added to the number who have earned the right to retire on pensions. He was appointed a Judge on July 19, 1884, and therefore completes fifteen years of Judicial service on the 19th of next month.—*The London Law Journal*.

***

*Too many counsel in a case*:—In a patent case, remarkable even among patent cases for the array of Queen's Counsel and juniors engaged, Mr. Justice *Wills* made the observation—not made for the first time, but none the less true—"In a multitude of counsel there is wisdom"; but as every truth, according to the philosophy of Hegel, is but half a truth, the stepping stone to a higher, so the same aphorism about a multitude of counsel must be received with a reservation for the frailties of human nature. A multitude of counsel means—when it comes to the conduct of a case—a divided responsibility. Each distinguished counsel, with perhaps a dozen cases of his own in his hands, is tempted —sorely tempted—to leave the many-counselled case to the industry of those who are 'with him'—at all events, not to put his whole heart and mind into it; and nothing can be more fatal to the success of a case than this weakening of responsibility. A counsel, on the other hand, who knows that the whole responsibility of a case rests upon him, that he can delegate none of it and depend on no one else, makes it his business thoroughly to master the case in all its details, facts and law alike; and from this perfect knowledge he gains the self-reliance and readiness which greatly help to win cases. Of course, solicitors have a very good reason for briefing several leaders, apart from the combined wisdom argument. They want to feel assured that they will have the presence of one leader at least when the case comes on, but it may be very much questioned whether in thus seeking to strengthen their position they are not unintentionally damaging it.—*The London Law Journal*.

***

*Inns of Court and Law Examinations*:—Speaking on Wednesday at the Mansion House dinner to the Judges, the Master of the Rolls said that in his opinion the standard of knowledge required by the Inns of Court in their Examinations was not high enough. Yet the recent Bar Examinations do not encourage the belief that admission to the profession is so easy as to afford no indication of legal knowledge. Of 101 candidates for pass certificates, 37 were unsuccessful; of 55 candidates in the Constitutional Law and Legal History Examination, 22 were

unsuccessful; of 25 candidates in the Roman Law, Constitutional Law, and Legal History Examination, 13 were unsuccessful; and of 60 candidates in the Roman Law Examination, 28 failed.—*The London Law Journal.*

***

*A Judge's remarks about the jury*:—Mr. Justice *Phillimore* displays on the Bench many qualities that command our admiration and respect, but the attitude he sometimes adopts towards Juries exhibits a strange misconception of the functions of a Judge. It is not many weeks ago since he thought fit at the close of a civil case to express his disagreement with the verdict of a Jury. Such a departure from the traditions of the Bench is regrettable enough in a civil case; it is infinitely worse in a criminal case in regard to a verdict of acquittal. A man was tried at Bodmin a few days ago on a charge of subornation of perjury. The Jury found him 'not guilty', whereupon Mr. Justice *Phillimore* deemed it necessary to make the superfluous remark that the prisoner was entitled to their verdict, and to observe that the Jury, by the reason they gave for acquitting him, showed that they had failed to understand the case notwithstanding all that has been said to them. If the learned Judge's observations be correctly reported, we have no hesitation in describing them as an unjustifiable attack upon our system of trial by Jury. It may be that the view taken by the Jury was wrong; but we entirely fail to understand on what ground a Judge is entitled to set up his own judgment as infallible, and to attach to a prisoner a stigma which the twelve men who have been intrusted with the duty of trying him have decided he does not deserve to bear.—*The London Law Journal.*

***

*The new list of Q. Cs.*:—A peculiarity of the latest list of new Queen's Counsel is that not one ordinary member of the Common-law Bar is included in it. Four of the eight new Queen's Counsel are members of the Parliamentary Bar, two belong to the Chancery Bar, one is a practitioner in the Admiralty Court, and another is a specialist in Revenue cases. Five belong to the Inner Temple, two to the Middle Temple, and one to Lincoln's Inn. The comparatively small number of junior members of the Bar on the governing bodies of the Inns is reduced by the latest distribution of 'silk;' Mr. Badcock has been a Bencher of the Middle Temple since 1895 and Mr. Ram has been a Bencher of the Inner Temple since 1897. The latest additions bring the total number of Queen's Counsel up to 250. Considerably more than half the number owe their appointment to the present Lord Chancellor. —*The London Law Journal.*

## NOTES OF AMERICAN CASES.

The negotiability of a note which contains a clause reserving the title to property for which the note is given until payment thereof, with a right to retake it in case of non-payment, is sustained in *Choate* v. *Stevens* (Mich.) 43 L. R. A. 277. The other authorities on the subject are collated in a note to the case.

***

The right of a building, loan, and investment society to execute negotiable paper is held, in *Grommes* v. *Sullivan* (C. C. App. 7th C.), 43 L. R. A. 419, to be implied in the power to incur debts for various purposes and to sell and mortage property. The annotation to this case reviews the other decisions on the subject.

***

Mere standing place on the side of a car is held, in *Graham* v. *McNeill* (Wash.) 43 L. R. A. 300, to be insufficient accommodation to charge a passenger with negligence in standing on the car platform.

***

A passenger carried beyond destination, and placed by the conductor in a hotel to await a return train on the following day, is held, in *Central of Georgia R. Co.* v. *Price* (Ga.), 43 L. R. A. 402, to have no right of action against the railroad company for damages sustained at the hotel in consequence of its proprietor's negligence, unless the conductor had express authority to constitute him the carrier's agent in caring for the passenger.

***

A promise to pay a debt when the debtor "might feel able to pay" is held, in *Pistel* v. *American Muntual L. Ins. Co.* (Md.), 43 L. R. A. 21,9 to create a legal and moral obligation to pay when the debtor is able, and to require him honestly to exercise his judgment as to that fact.

***

The mere expression of dissatisfaction with an article furnished under a contract providing that it shall be satisfactory is held, in *Worthington* v. *Cwin.* (Ala.), 43 L. R. A. 382, insufficient to justify a termination of the contract, when there was no actual dissatisfaction; and a slight defect in a small quantity of material delivered under a

contract for successive shipments is held insufficient to justify an abandonment of the entire contract.

***

The serial publication of "The Autocrat of the Breakfast Table" in "The Atlantic Monthly" before taking steps to secure a copyright is held, in *Holmes* v. *Hurst*, U. S. Advance Sheets, 606, to be such a publication under the copyright law as to vitiate the subsequent copyright of the whole book.

***

Neither the probate court nor the personal representative of a deceased person is held, in *O'Donnell* v. *Slack* (Cal.), 43 L. R. A. 388, to have any right to the body, in the absence of any testamentary provision on the subject, or to control the manner of its disposal or the place of its interment.

***

The jurisdiction of a court to enjoin a foreign insurance company against collecting excessive assessments from a resident of the local jurisdiction, or forfeiting his policy for non-payment, is denied in *Clask* v. *Mutual Reserve Fund Life Asso.* (D. C.), 43 L. R. A. 390, on the ground that the relief sought would interfere with the internal affairs of the corporation.

***

The loss of a reward offered for the capture of a criminal is held in *McPeek* v. *Western Union Teleg Co.* (Ia.), 43 L. R. A. 214, to be recoverable as a part of the damages for failure to deliver a telegram giving advice as to the whereabouts of the fugitive, although it did not show on its face the purpose for which it was sent, where the company knew that a message relating to the captur3 was expected.

***

A change of a country road to a city street in consequence of the incorporation of a city is held, in *Huddleston* v. *Eugene* (Or.), 43 L. R. A. 444, not to impose an additional servitude upon the land over which the road runs, so as to require any new condemnation.

***

The failure to construct fire escapes on a hotel as required by an ordinance is held, in *Weeks* v. *McNulty* (Tenn.), 43 L. R. A. 185, insufficient to make the proprietor liable for the death of a guest by fire, where it does not appear that the fire escape would have afforded him any benefit, but there is evidence that he had locked himself in his room and tried to break the door to make his escape, and also that he might have escaped safely by leaping from the window to the roof of an adjoining building.

***

A woman to whom an infectious disease was communicated by a man with whom she had contracted a void marriage while she had a former husband was held, in *Deeds* v. *Strode* (Id.), 43 L. R. A. 207, to have no right of action against the man with whom she was living, on account of the injury, where he had not been guilty of any fraud or deceit in bringing about their relations.

***

A peculiar case respecting the liability of a person for negligence while insane or mentally incompetent is that of *Williams* v. *Hays* (N. Y.), 43 L. R. A. 253, holding that the charterer of a vessel, who is in command, is not liable for her loss because of a lack of care or skill in her navigation after he has become irresponsible on account of physical and mental exhaustion resulting from his being continuously on duty in efforts to save the vessel during a storm.

***

An order of court for the mortgage of an infant's property, rendered in the exercise of a limited but statutory jurisdiction, and procured by fraud, to secure a debt contracted by the guardian in carrying on business without authority in the infant's name, is held, in *Warren* v. *Union Bank* (N. Y.), 43 L. R. A. 256, to be invalid and subject to attack by a suit in equity.

***

An injunction against the construction and operation of an electric railway on a public street without legislative authority is denied in *Birmingham Traction Co.* v. *Birmingham R. & E. Co.* (Ala.), 43 L. R. A. 233, on the ground that the construction of the road would be a mere private trespass for which compensation could be had at law.

***

The mere fact that the sale and drinking of intoxicating liquors is only an incident, and not the main object, of a social club, and that only members are permitted in the rooms, is held, in *Mohrman* v. *State* (Ga.), 43 L. R. A. 398, insufficient to make the place any less a tippling house within the restrictions of a statute.

***

Judgment and execution against one of the makers of a joint note for his proportionate share, are held, in *Sully* v. *Cambell* (Tenn.), 43 L. R. A. 161, to leave the other makers liable for the amount still unpaid, where the statute makes the note joint and several. With the case is an extensive note on the effect of judgment in an action against part of the obligors on a joint or joint and several contract, to release or limit the liability of the other obligors.

***

The Madras Law Journal.

PART VII.] JULY 1899. [VOL. IX.

## THE RECEIVING MOTHER.

*Annapurni Nachiar* v. *Collector of Tinnevelly*, *I. L. R.*, 18 *M.*, 277.

The question is whether the mother receiving in adoption only, or both she and the co-wife of the father have the status of mother to the deceased adopted son, the propositus. Even if the property had been a partible estate, the receiving wife alone as the mother would have been entitled to succeed to the exclusion of the father's co-wife who is only a step-mother. At the outset such a conclusion must commend itself to every jurist, for, a fiction in law—and adoption is but a fiction in law,— should as nearly as possible imitate nature and not violate it. This is peculiarly so with the question at issue, for, it would be the very reverse of reality in nature to recognise by fiction that a man has two or more mothers. The fiction of adoption in Hindu Law is one which is essentially assimilated to nature, so much so that by fiction he not only becomes the son born in the adoptive family but also ceases to be the son of his natural parents. In the family of adoption he acquires all the rights of a son by birth, entitling him to inherit not only to his adoptive parents but to all their relations to whom a natural born son would inherit; and his heritable right to his natural parents and to all their relations to whom he would have inherited, had he not been adopted, is cut off. Is it consistent with the genius of such a law that the fiction of adoption should outrage nature by predicating more than one mother to an adopted son?

Under the Roman law of adoption the reason assigned (1) why a man cannot adopt a person older than himself is, adoption imitates

(1) The Institutes of Justinian translated by J. B. Moyle, 2nd edition of 1889, bottom of p. 16.

nature and that it would be unnatural for a son to be older than his father. This should be equally true under the Hindu Law, for, under that Law,(1) almost the whole Law of adoption has been evolved from the canon that he must be "the reflection of a son."

There is no topic of Hindu Law on which the original text is so meagre as that on adoption. The law of adoption has been developed principally by commentators and by the Judiciary. Unless some clear authority in Hindú Law or some authoritative judicial decision is cited in support of the position that the father's co-wife who did not join in the adoption is entitled to the status of mother, it would be quite unreasonable to suppose that any court will hold that the Hindu system of Jurisprudence is so absurd as to create by fiction two or more mothers to one and the same person. There is no express authority bearing on this question either in the original texts of Hindu Law or in the works of any Hindu commentator which have been translated and published. There are however certain principles and analogies recognised or indicated by such texts and commentaries, from which it is apparent that the wife, in conjunction with whom alone the adoption is made by the husband, is the mother and the other wives are only mothers in a secondary sense, *i.e.*, they are only step-mothers. The modern authors on Hindu Law, both English and Indian, maintain the same view. Among judicial decisions, there are but three bearing on the question, all of which are in favor of the contention that the receiving mother alone is the mother; and one of which is exactly in point.

The only authorities which may seem to support the opposite view are two. One of them, *viz.*, the opinion of Mr. W. H. MacNaughten (2) expressed in the preface to his work on Hindu Law is really, when analysed, in support of our contention.

The other authority is Jagannatha's commentary as translated by Mr. Colebrooke.(3) He does not deal with the case of an adoption made by a person having several wives, in conjunction with only one of them. But he refers generally to an adoption by

(1) Mayne's Hindu Law and Usage, para. 94, *i.e.*, bottom of p. 104.

(2) W. H. MacNaughten's Hindu Law, 3rd edition, p. 13 of the preliminary remarks.

(3) Colebrooke's Hindu Law, 4th edition, Vol. II., p. 394.

a person having two wives without saying whether either of them joined in the act of adoption; and mentioning the difficulty of such adopted son claiming maternal ancestry on the side of both the wives, he meets the difficulty by observing that some reconcile it by suggesting that the two sets of maternal ancestors should be jointly considered as the manes of ancestors.

This explanation forcibly brings out the consciousness of the commentator that it would be absurd to regard an adopted son as having two lines of maternal ancestry because his father has two wives. He tries to explain away this absurdity by suggesting another fiction that both the lines should be conjointly considered as the manes of ancestors. He evidently was contemplating a case where the adoption was made by the husband without either of his wives joining him. Though, as a general rule, the husband associates one of his wives with him in the act of adoption, yet the adoption would be legal even though he does not so associate with him any of his wives. Evidently it was such a case that Jagannatha was referring to in his commentary and he was unable to suggest a better solution of the supposed difficulty of the adopted son having two lines of maternal ancestry. If the adoption has been made in conjunction with one of the wives, no difficulty would have suggested itself at all; for, in such a case, the wife who joined in the adoption and received the adopted boy would certainly be regarded as the mother and the line of her ancestry as the only maternal ancestry of the adopted son, while the line of ancestry of the other wife would not at all be regarded as the maternal ancestry of such adopted son. The case which was evidently in the contemplation of Jagannatha is, no doubt, one which presents some difficulty; for, neither wife joined in the adoption. If he had an only wife and she did not join in the adoption, she, no doubt, would, notwithstanding that she did not join in the act of adoption, become the mother of the adopted son and entitled to succeed as such (*vide* Dattaka Mimamsa, section I, verse 22).

There is no text referring to a case in which a person so adopting had more wives than one. The explanation suggested by Jagannatha to solve this anomaly is really no explanation at all. If it were necessary to suggest a solution in such a case, to avoid the anomaly

of the same person having two mothers and two lines of maternal ancestors, it will by no means be difficult to deduce a solution from admitted principles of Hindu Law. Though an adoption made by a Hindu without his wife joining him in the act of adoption is perfectly legal, yet from a religious point of view, he ought to associate with him his wife, and in case he has more wives than one, his senior or first married wife. This rule of preference in favor of the senior wife is merely a moral injunction, and is often violated out of partiality to a favorite wife, and in a legal point of view he may associate with him any one of his wives, even though she be the most junior. If he does not associate with him any of his wives, then, according to the moral precept that the first married wife should be associated with the husband in performing acts of religion, she should be regarded as having been associated in the act of adoption and, therefore, as the mother of the adopted son, the other wives of the husband being regarded as step-mothers. There is also another solution that may be suggested, having regard to the principle of Hindu Law, in a religious point of view, that marriage is for begetting male issue and that a man may marry wife after wife if the previously married wife does not present him with a son. If a man having several wives adopts a son without associating with him any of the wives in the act of adoption, the adoption takes place because even the wife last married has not given birth to a son; and in this view it may be suggested that the last wife should be regarded as having been associated with the husband in the act of adoption, and as such, the mother. When the husband selects any one of his wives to associate with him in the act of adoption as he is perfectly competent to do, in the same way in which he may select any of his wives for the purpose of begetting issue, no difficulty could at all arise. She is the receiving mother by the choice of the husband and is as such the only mother, the other wives of the father being only step-mothers. The difficulty arises only in the solitary case in which a man having more than one wife makes an adoption without associating with him any of his wives in the act of adoption. Nobody suggests that a man having several wives could associate with him more than one wife either in the act of adoption or in any other religious act. Such a thing cannot and does not occur, because, according to

ceremonial law, only one of the wives and that generally the eldest wife is associated with him in all religious acts. But if it should be asked how the question of maternity is to be determined, if a person chooses to associate with him two or more of his wives in the act of adoption, the answer is that the senior of them alone would be regarded as the receiving mother and as such the only mother of the adopted son, the joining of the other wives in the act of adoption being viewed as superfluous. The theory that an adopted son may have two or more mothers would lead to many anomalous, if not absurd, results, and, in fact, place him in a more advantageous position than an *aurasa* or a natural born son. He would be entitled to succeed to two maternal grandfathers while a natural born son could only succeed to one maternal grandfather. It has now been definitely settled that a daughter's son by adoption has the same right of inheritance to the father of the adoptive mother as the natural born son of a daughter. Suppose a person makes an adoption, after the death of his 1st wife, in conjunction with his 2nd wife, married either during the life-time of the 1st wife, or subsequent to her death, and the father of the 1st wife dies after such adoption leaving no widow nor daughter, could such adopted son claim to inherit the estate of the deceased father of the 1st wife as his daughter's son by adoption? If the opposite view were sound, the 1st wife also would be one of his mothers and he should be entitled so to succeed. Take an equally anomalous case of a man having only one wife who makes an adoption in conjunction with her and then marries a 2nd wife. Is the 2nd wife also to become the mother of the son adopted previous to her marriage and is he to succeed to the estate of the father of such 2nd wife as his maternal grandfather? Such anomalies may be multiplied. The only rational principle is that though a son may be adopted to a deceased male even long after his death by his widow under proper authority, yet there is no such thing as an adoption to a female either during her life-time or after death. She may become mother by fiction at the time of the adoption to her husband, but no female could become the mother of a son adopted by or to her husband after her death nor could a female become the mother of a son adopted by her husband before her marriage. No wife could become the mother of a son adopted by or to her husband either subsequent to her death or prior to her marriage, and

adoptive father by joining in the act of adoption and receiving the boy adopted becomes the mother of such adopted son and her ancestors become his maternal ancestors. It may be that in the two texts the word "only" is used to exclude the natural mother and her ancestors, but that does not detract from the force of the inference which is deducible from the two texts that the receiving wife is the adoptive mother. This is really strengthened and not weakened by the text first referred to, *viz.*, Dattaka Mimamsa, section I, placitum 22. In the above text, the author of the Dattaka Mimamsa refutes the position that the assent of the wife is necessary for the validity of an adoption by the husband, and maintains that owing to the superiority of the husband by the mere fact of adoption the filiation of the adopted as son of the wife is complete in the same manner as her property in any other thing accepted by the husband. This shows that the filiation as the son of the wife, of a boy adopted by the husband alone without the assent and association of the wife is on the same footing as her right in any property accepted by the husband alone. Even in the case of a Hindu having a son by one of his several wives,* such a son is, in a sense, the son of all the wives; the sense being that he is the step-son of each of the other wives and each of them his step-mother; and not that he will be entitled to succeed to each of them as son or that each of them will be entitled to succeed to him as mother. By analogy, therefore, if a Hindu adopts a son by associating with him one of his wives, she alone becomes the mother and the other wives become only step-mothers. This is exactly the view propounded by one of the Court Pandits (Hindu Law officer) of the Supreme Court at Calcutta in answer to certain questions referred to him in a certain case in 1823.

Q. Can three widows adopt, one of them being related to the child?

A. Only one can adopt. The three may agree upon the child to be adopted, but only one of the widows can adopt.

Q. Does the child so adopted become the child of the widow so adopting or the child of three?

A. The child becomes the child of all three.

---

* Sacred Books of the East, Vol. XXV., p. 365, para. 183, Manu.

Q. Suppose the child to die after adoption, which of the widows inherits the property?

A. The widow adopting him, if he should die under age. She will be called the mother and the others the step-mothers.

These questions and answers will be found at p. 11 of the appendix of Sir F. MacNaughten's Hindu Law * and also referred to by Mr. Mayne in his Hindu Law and Usage, 5th edition, Note *x* to para. 125, p. 146.

The three answers above set forth clearly bring out the three essential propositions bearing on the question at issue.

*1st*,—That though one may have several wives only one of them can receive the boy in adoption.

*2ndly*,—That all the wives are the mothers of an adopted son in the sense in which all the wives are the mothers of a son born to any one of them.

*3rdly*,—That, on the death of the adopted son, unmarried and issueless, that wife alone, who received him in adoption would succeed as mother, the other wives being only his step-mothers.

This has not only the merit of avoiding the absurdity of a person being supposed by fiction to have two mothers, but has also the merit of assimilating it to the case of an *aurasa* or natural born son of a person having two or more wives. Apparently the Dattaka Mimamsa and Dattaka Chandrika take the same view (*vide* Dattaka Mimamsa, sec. II, verse 69, and Dattaka Chandrika, sec. I, verse 23, and Mayne's Hindu Law and Usage, para. 125).

The practical result both in the case of an *aurasa* or natural born son and an adopted son of a man having several wives is, under the Mitakshara law, that the natural or the receiving mother alone, as the case may be, will succeed to him as mother; while the other wives of the father, as step-mothers, are not recognised as heirs at all. In the event of his natural or receiving mother having no daughter or daughter's issue then he would succeed to her stridhanam, but in regard to stridhanam property of

* Sir F, MacNaughten's considerations of Hindu Law, Appendix, p. 11.

his father's other wives or step-mothers his place in the line of inheritance is only as the sapinda of her husband, his father, and that only, if the father's marriage with the step-mother was in one of the approved forms. As regards the ceremonial law, the natural born son or the adopted son, as the case may be, stands in the position of a son to all the wives and as such has to perform the obsequies of all the wives of his father; but so far as the maternal ancestry is concerned, he has to offer oblations only to the ancestors of the natural receiving mother while no oblations are offered to the ancestors of the step-mother.

Turning now to modern authorities reference may be made to Sir F. MacNaughten, W. H. MacNaughten, West and Bühler and Mr. Mayne among English authors, and to Justice Gurudas Banerjee's 'Hindu Law of Marriage and Stridhanam', Battacharya's Commentaries on Hindu Law, Vyavastha Chandrika and Golap Chander Sircar 'on Adoption among Indian authors'.

In Sir Francis MacNaughten's Hindu Law, p. 171, the author in commenting upon the case in which as already mentioned certain questions were referred to one of the Hindu Law officers of the Supreme Court of Calcutta, stated as follows:—

"The law is clear and was undisputed. The boy could not be received by the three widows jointly. He must be received by one of them—and would then be considered as the son of Lakhinarain and the widow by whom he had been received—about this there was not, because there could not be, any dispute."

The same principle will *a fortiori* be applicable to an adoption made by the husband in his life-time in conjunction with one of his wives.

Mr. W. H. MacNaughten in his preliminary remarks or preface to his 'Principles and Precedents of Hindu Law', 3rd edition, 1874, at pp. 12 and 13, after observing that cases of omission in codes of law can only be supplied by analogy gives as an illustration of such omission in Hindu Law, the instance of a man dying childless and leaving three widows him surviving, with authority to one of them to adopt after his death, which is done accordingly. He then considers the question as to who would succeed to such adopted son on his death issueless, leaving the three widows him surviving, and assumes

that those who maintain that the estate would devolve "of right to the widow who received him in adoption to the exclusion of the other two, who can be considered in the light of step-mothers only" concede, however, that, had the childless husband adopted the boy during his life-time, he could not have selected for him, as adoptive mother, one of three wives, and excluded the other two from all maternal relations. Mr. W. H. MacNaughten then expresses his dissent from the view that the adopting widow only succeeds, and says that, though the reasoning in support of such view seems plausible enough, yet it is not the law. According to him, the three widows should, in a legal point of view, be held to be one and the same individual and the adopted son should be regarded as holding the same relation to all three widows of the adoptive father. The author then guards himself by limiting his opinion to a case in which the exclusive privilege in favor of the widow making the adoption is claimed from the simple fact that she alone made the adoption, and concedes that she would have the exclusive privilege of succeeding as the only mother of the adopted son, on his death, if it could be shown that the intention expressed or implied of the deceased husband was that such widow alone should be considered as the mother of the adopted child; but that the mere fact of his having commissioned only one of the widows to select and adopt the boy is not a sufficient indication that she alone is to have the status of mother to the boy. Mr. W. H. MacNaughten, therefore, recognises the principle that a person having two or more wives can constitute one of them as the mother of the adopted boy. Whether he is right or not in supposing that, when a husband authorises one of his three widows to adopt a boy after his death, it is reasonable to imply that his intention was to constitute her alone the mother of the son to be adopted, is a question which it is unnecessary to decide. It may be added that, in the view of one acquainted with Hindu usages and sentiments that nothing could be a stronger indication of the husband's intention that all his surviving widows are not to occupy the position of mother to the boy to be adopted after his death, but that only one of them should occupy such position than the circumstance of his authorising only one of the widows to select and adopt a boy. Mr. W. H. MacNaughten's statement that, in the illustration given by him, those who maintain that the widow who received the boy

in adoption would alone succeed as mother, conceded that, if the adoption had been made by the husband himself in his life-time, he could not have selected one of his wives alone as the mother, can carry but little weight. It does not appear who the person or persons were who made that concession which, on the face of it, to say the least, is inconsistent with the position they took, *viz.*, that by a husband's authorising one of his wives alone to adopt after his death, he constituted her alone as the mother. Mr. W. H. MacNaughten himself admits that the receiving widow alone would occupy the position of the mother, if that was the intention of the deceased, expressed or implied. If Mr. W. H. MacNaughten be right in this view, as undoubtedly he is, it necessarily follows that such intention on his part must have equal efficacy in the case of an adoption made by himself in his life-time which adoption he makes in conjunction with one of his wives to the exclusion of the other. The solitary authority of Mr. W. H. MacNaughten far from supporting the opposite view recognises the important principle that the husband could constitute any of his wives as the mother of the adopted boy.

The learned authors of West and Bühler's Digest deal with this question at pp. 1181 and 1182 of their Digest and they adopt the view of Sir F. MacNaughten and cite with approval the two judicial decisions which will hereafter be referred to. They first refer to the relations that exist between adoptive step-mother and son. The very expression "adoptive step-mother" negatives the appellant's theory that in the case of an adopted son all the wives of the adoptive father stand in the position of mother and the receiving mother alone is not the mother. At p. 1182 the learned authors say that "the importance of the right to adopt as between two or more widows becomes evident when it is borne in mind that the one taking the place of mother succeeds first to her son on his death without a child or widow. The step-mother is comparatively a remote successor." The learned authors then allude to the criticism by Mr. H. H. Wilson of the three widows' case quoted and considered by Sir F. MacNaughten at p. 171 of his considerations on Hindu Law. The criticism does not bear upon the question now at issue, but is directed to show that the property being ancestral, the testator who died leaving a natural born infant son

him surviving, could not by his testamentary authority to adopt, which was exercised, on the death of the natural born infant son, by one of his three widows, not being his mother, divest the mother, of the estate which, by the operation of the law, devolved upon her as the heir of her deceased infant son, and transfer the same to the adopted son and on his death to the receiving widow as his mother. Mr. Wilson, therefore, evidently acquiesces in the view that the boy could be adopted only by one widow and that she alone could occupy the position of mother; the other widows occupying the position of step-mothers; and Mr. Wilson would not have criticised the case adversely, if the testator had not left, him surviving, a natural born son by one of his surviving wives.

Mr. Mayne in his Hindu Law and Usage does not discuss this question directly. In paras. 125 and 154 he compares the rights of an adopted son with those of a natural born son and in maintaining they are identical, he places him in relation to the wives of the adoptive father, in the same position as the natural born son by one of the wives. In para. 125 after holding that the real fiction is only that the adoptive father had begotten the child upon its natural mother and not that the natural father had also begotten the child upon the adoptive mother, he states as follows:—

"The natural son becomes the son, not merely of the particular wife from whom he is born, but of all the wives; and the authors of the Dattaka Mimamsa and Dattaka Chandrika seem to think that the same result follows in the case of several wives from an adoption. The fiction can hardly extend to the length of his being conceived by all." It is in connection with this that he cites in his footnote *x* in para. 125, the opinion of the Hindu Law officer already referred to and placitum 183, Chap. IX of Manu. Under Manu's text, as already stated, all the wives are not mothers in the sense either that he succeeds to them all as son or that they succeed to him as mother. Mr. Mayne says that an adopted son in the case of a man having several wives, occupies the same position as a natural born son. That position, therefore, can only be, that one alone can be his mother, entitled to inherit to him, while the others would be only his stepmothers: who that one is to be, is shown by the Hindu Law officer's opinion referred to in the footnote *x* to para. 125 of Mr. Mayne's book. Para. 154 is devoted principally to

the consideration of the right of an adopted son to succeed to the family of his adoptive father's wife or wives. Mr. Mayne states :—

"*Prima facie* one would imagine that he must necessarily do so. The theory of adoption is that it makes the son adopted, to all intents and purposes, the son of his father, as completely as if he had begotten him in lawful wedlock. The lawful son of a father is the son of all his wives and would, therefore, I presume be the heir of all or any of them. And so it has been laid down that a son adopted by one wife becomes the son of all and succeeds to the property of all. The same result must follow where the son is adopted not by the wife but by the man himself."

The authority which Mr. Mayne cites in his footnote *m* to para. 154 in support of his position that a son adopted by one wife becomes the son of all and succeeds to the property of all is *Teencowrie* v. *Dinonath* 3 W. R., 49, the dictum in which is decidedly in support of our view. According to that decision he would succeed to the *stridhanam* property of the co-wife of his adoptive mother, as her stepson and not as her son.

Turning now to modern treatises on Hindu Law by Indians, Mr. Justice Banerjee's 'Hindu Law of Marriage and Stridhanam' invites prominent attention. He deals specially with this question. With reference to the husband associating with him one of his several wives in performing acts of religion, he says, at p. 129 (2nd Edition Revised 1896) :—

"One of the most important of these acts" (of religion) "which has also a legal aspect is the taking of a child in adoption. The wife who is associated with the adoptor in this act becomes the mother of the boy adopted, and her maternal ancestors become the maternal ancestors of the adopted son."

At p. 356 (same edition) he says :—

"An adopted son may become affiliated to a woman either by being taken in adoption by her husband in association with her or by being taken by the husband alone * * * * * or by being taken by the husband in association with another wife. * * * * * In the 1st two cases the adopted

son would, of course be regarded as son of the woman, but in the last case the question arises whether he is the son of the woman herself or the son of the co-wife ".

In answer to this question, he refers to the observations of the High Court of Bengal in its judgment in the case of *Teencowree Chatterjee* v. *Dinonath Banerjee*, 3. W. R., 49, as showing that the son adopted by the husband of a woman in association with another wife should be regarded not as her son but only as the son of a rival wife for purposes of succession to *stridhana*.

Bhattacharya in his Commentaries on Hindu Law says as follows, at p. 151 :—

"But in the case of an adoption by the husband, the child taken becomes, by his act, the son of his wife also, except when the ceremony was performed in conjunction with another wife. Nanda Pandita says 'the forefathers of the mother that accepts in adoption, are also the only maternal grandsires of sons given and the rest.' Dattaka Mimamsa VI, S. 50. In this passage the word '*Eva*' (only) is meant to exclude the paternal ancestors of the natural mother. But it can be taken also to exclude the paternal ancestors of the adoptive mother's co-wives ".

The following placitum in Vol. II, Vyavastha Chandrika of Shyamacharan Sirkar, has a material bearing on the question.

"348. Should the adoptor have many wives, then the adopted is to perform the Parvanasraddha in honor of the father and two other ancestors of that wife alone by whom he was received in adoption " (1).

In the next placitum he lays down :—

"349. If, however, he was received by none of them, either in conjunction with or under the authority of her husband, but by the husband alone, then the adopted is to perform the Parvanasraddha in honor of the ancestors of all such wives of the adoptor ".

In the notes under this placitum, reference is made to the passage in Jagannatha's digest already referred to. This clearly shows that the author of Vyavastha Chandrika understood Jagannatha as

(1) Vyavasta Chandrika, Vol. II., p. 161.

referring only to a case in which the adoption was not made in association with any one of several wives (1).

The last authority under this head, though not the least in importance, is Golap Chander Sircar's Law of Adoption, published in 1891. The Judicial Committee of the Privy Council quote him with approval more than once in their recent judgment on the question of the validity of the adoption of an only son. He takes the strongest view in favor of our contention. He maintains that, unless the wife joins the husband in the act of adoption, she cannot acquire the status of a mother even in a case in which the husband making the adoption has only one wife. He explains that the affiliation referred to, in placitum 22 of section I of Nanda Pandita's Dattaka Mimamsa, is merely nominal, just as nominal as the wife's co-ownership in any property belonging to the husband (2). He also refers to a son adopted by a husband against the wife's will or without permitting her to associate with him in the ceremony of adoption as the son of the wife in a tertiary sense and that he does not stand to such wife or wives even in the position in which a natural born son by one wife stands with reference to her co-wife or co-wives. This may be overstating the case, for the relationship in which such a natural born son stands to the co-wives of his mother is simply by reason of such co-wives being the wives of his father. Similarly, if he were adopted in conjunction with no wife or in conjunction with one of the wives he must stand in the same position to all the wives of his father or to all the wives except the receiving mother as the case may be. The author unequivocally lays down that "if the husband alone or with one wife, adopts a son, then his wife or another wife respectively not joining the husband in the act of adoption cannot be called the mother that accepts in adoption."

Thus it will be seen on a review of all the foregoing authorities that there is a remarkable consensus of opinion that when a man makes an adopiton in conjunction with one of his wives only, she and she alone is the mother, while the co-wives are only step-mothers. The only case in which there is any difficulty or

(1) Colebrooke's Digest, 4th edition, Vol. II., p. 394.

(2) Sircar on Adoption, p. 227.

Sircar on Adoption, p. 215.

divergence of opinion is the one in which a man having one or more wives makes an adoption without associating with him any of them in the act of adoption.

All that now remain to be noticed are the two reported cases one of which is a precedent quite in point. It is the case of *Kasheeshuree Debia* v. *Greesh Chander Lahoree* decided in February, 1864, by a division Bench of the Calcutta High Court consisting of *Bayley* and *Jackson*, JJ. (1). In that case according to the facts found, one Kalikant having two wives adopted in his life-time one Sarodapershad in conjunction with his second wife only. After the death of Kalikant and of his junior wife, the adopted son died unmarried and issueless. The plaintiff, the senior wife of Kalikant claiming as the mother and heir of the adopted son, Sarodapershad, sued the defendant in possession who was the nephew of Kalikant. The contention on behalf of the plaintiff appellant was that both she and the deceased junior wife must be regarded as mothers by adoption of Sarodapershad, and as the junior wife predeceased the adopted son, that she as the only surviving mother, was entitled to succeed. The decision of the original court as well as that of the Court of Appeal was that she was only in the position of a step-mother to the propositus, the adopted son, and, therefore, she was not the heir entitled to succeed to Sarodapershad's properties.

The next and only other reported case in which there is only a dictum, though a clear one, is the case of *Teencowrie Chatterjee* v. *Dinonath Banerjee* decided in May, 1865, by another Division Bench of the Calcutta High Court. In this case, it was contended that an adopted son cannot inherit to the *stridhanam* property of his adoptive mother (2). It was held that the adopted son was entitled to succeed to the adoptive mother in the same way as he is entitled to succeed to the adoptive father. Apparently the adoptive father had only one wife and her status as mother was admitted. But the contention was that, in the adoptive family, the adopted son could only succeed to the property of his adoptive-father and not to the *stridhanam* property of the adoptive mother. Counsel

(1) Sup. Vol. W. R. Jan. to July 1864, p. 71.
(2) 3 W. R., p. 49.

who advanced this contention, urged in support of such contention by suggesting that a contrary contention would give rise to a difficulty in the case of the adoptive father having more than one wife. The Judges, in noticing this argument, meet it by stating that the Hindu Law of Inheritance provides even for this case, by providing that the son of a contemporary wife is among the heirs of a woman entitled to succeed to her *stridhanam*, thereby implying, that by analogy the adopted son would succeed to the *stridhanam* of the co-wives of his receiving mother. This decision is cited and approved by the High Court of Bombay in the case of *Gogobai* v. *Srimant Shashaji Maloji Row Raoje Bhosle*.(1)

JURISPRUDENCE.

---

## APOLOGY.

In a recent case which excited considerable local interest, the question arose as to the legal effect of an apology in proceedings for libel. There is no statutory provision in India regarding it. We have, therefore, to look for the law in England to determine whether any legal weight is to be attached to an apology in civil or criminal proceedings. In the absence of any provision of the Penal Code, we may take it as clear that it is no defence in criminal proceedings. The only question that can possibly arise is, whether it can act in mitigation of punishment? It is impossible to say that an apology ought to have no effect upon the mind of the Judge. The fact of a prisoner confessing or expressing remorse for his criminal conduct cannot but weigh with the Judge in determining the *quantum* of punishment. Whatever be the true theory of punishment, whether it is the vengeance of the State, or the revenge of the party wronged, or the improvement of the criminal or an educative warning to the rest of society, there can be no doubt that the measure of punishment will be somewhat regulated by the state of mind of the prisoner towards acts of the kind for which he is arraigned. It is further impossible for the presiding Judge altogether to keep out of his mind the consideration that the prisoner condemns the act for which he is arraigned and feels sincerely sorry for it. It is, however, no defence to the proceeding, and can at no time be listened

(1) I.L.R., 17 B., 120.

to as such. It has, however, been said that a writ of criminal information, which is a prerogative writ, may be refused to the relator if upon *rule nisi* being issued, it is proved that the defamation was published inadvertently and an apology promptly published. A writ of criminal information would be refused for several other reasons also which would have no place in proceedings by criminal indictment. In *Regina* v. *Labouchere*, 12 Q. B., 320, the writ was refused on the ground that the complainant was resident abroad. In *Regina* v. *Aunger*, 12 Cox's Criminal Cases, 407, where the relator did not specifically deny the truth of the imputation that he rejected the vote of a woman, the rule *nisi* was discharged. The fact, therefore, of a writ of criminal information not being easily obtainable where the accused has purged his criminality by the publication of a prompt apology, only shows that a high prerogative writ would not be available to the relator, but not that an apology is an answer to criminal proceedings. On the other hand, where a criminal information is applied for the purpose of extorting an apology, the Court will not allow the writ to issue; and it was ruled by Chief Justice *Cockburn* in *Regina* v. *The World*, 13 Cox's Criminal Cases, 305, that it would be incumbent upon the Court, in order that its process might not be used simply for private purposes, to require before allowing the proceedings to be instituted an undertaking by counsel on the part of the relator to proceed with the prosecution in order to ensure its being carried to its legitimate conclusion. See Folkard, p. 371. It is needless to add that in proceedings by indictment, which is the ordinary procedure in a prosecution for libel, any apology by the accused cannot be taken into account.

As already observed, there is no statutory provision regarding the effect of an apology in civil actions in this country. Here, again, the state of the law in England has no real bearing, unless there is any rule of the common law relating to the place and effect of an apology. An apology, provided it is fair and full, cannot but produce a reasonable effect upon the mind of the Judge in determining the *quantum* of damages. An apology is, a mode of making amends, and must operate in mitigation of damages, even though it is not made at the earliest opportunity after the commencement of the action. *Smith* v. *Harrison*, 1 F. & F. 565. It is no defence to the action under the common law. By Lord Campbell's Act, however, 6 & 7 Vict., ch. 96, it is provided (*vide* S. 1 of

the Act) that the defendant in any action for defamation may give in evidence in mitigation of damages, that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or as soon afterwards as he had an opportunity of doing so in the action, where the action shall have been commenced before there was an opportunity of making or offering such apology.

Apology has been made a defence in a civil action in a limited class of cases. S. 2 provides that where the libel was inserted in a public newspaper or other periodical publication *without actual malice and without gross negligence,* the defendant may plead in defence that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such newspaper or other periodical publication a full apology for the said libel. A further limitation has been imposed by S. 9 of 8 & 9 Vict., ch. 75 that the defendant should pay some money into Court in addition to the apology. Where there has been malice or gross negligence, or the publication is not contained in a newspaper or other periodical publication, or the apology is not prompt, or there is no payment into Court, the apology is no defence. It is needless to add that these statutory provisions have no force in India. The common law rule that an apology operates in mitigation of damages would of course apply.

---

## NOTES OF INDIAN CASES.

**Alamai** *v.* **Positive Government Security Life Assurance Company,** I. L. R., 23 B., 191. The question in this case is a novel one and must be of considerable interest to Insurance Companies and to the large and increasing number of people with whom insurance is a craze. Unless a person has, what is called an insurable interest in the life of the person whose life is insured, the contract is void under the provisions of the Contract Act. The law is the same in England as to the necessity of an insurable interest. A contract of this description is of the nature of a wagering contract, but some wagering contracts like contracts of life or fire insurance are excepted from the rule which renders them void. In the absence of an insurable interest, the case does not fall within that exception. Without attempting an exhaustive definition of what an insurable interest is, it is sufficient to point out that some relationship as that of husband and wife, or that of father and

son, would be an instance of such interest. The same view was taken by the Madras High Court in a recent case.

**Empress v. Durand,** I. L. R., 23 B., 213. There seems to be no doubt of the correctness of Mr. Justice *Candy's* ruling in this case. The rule that the accused should not be examined upon oath or called as a witness does not apply when he is brought to be examined as a witness in the trial of another accused, whether charged with the same offence or not, if that other is separately tried. It may be inconvenient that the accused should be subjected to cross-examination as a witness in respect of matters as regards which he is awaiting his trial.

**Queen-Empress v. Raghu,** I. L. R., 23 B., 221. The High Courts in India have been divided as regards the admissibility of a confession not taken in accordance with the provisions of S. 164 or 364, the Calcutta Court holding evidence inadmissible and the Bombay Court holding such evidence to be receivable. In *Queen-Empress* v. *Viran*, I. L. R., 9 M. 224, the Madras High Court seems to have taken the same view as the Calcutta High Court. But S. 533 of the present Code has been so amended as to render evidence of the statement receivable, whether the informality was an omission to comply with the provisions of S. 164 or 364, or an infraction thereof. It seems, therefore, unnecessary to consider hereafter which of the conflicting views is correct.

**Murigeya v. Hayat Saheb,** I. L. R., 23 B. 237. The question in this case relates to the applicability of S. 244 to cases where a claim is made by the representative of the judgment-debtor as trustee for another. It seems to us that the language of Ss. 278 to 280 makes it clear that such a claim is not to be adjudicated upon under S. 244. A distinction may, however, be drawn between cases where the representative of the judgment-debtor is pursued in execution and those where the decree itself is obtained against the representative of the debtor. In the latter case where the judgment-debtor pleads that the property is held by him as trustee and that it is not liable for the decree-debt, it may seem more doubtful whether the question is to be treated as one for investigation under the claim sections merely. We think, however, that the view of *Ranade*, J., and not that of *Parsons*, J., is the sounder view. If the claim is made as trustee, the matter cannot be dealt with under S. 244.

**Raghunath Mukund v. Sarosh K. R. Kama,** I. L. R., 23 B., 266. Article 20 of the 2nd Schedule to the Provincial Small Cause Act, speaks of suits under S. 283 of the Code, and Article 19 of other suits for declaratory decrees. Article 21 refers to a suit to set aside an attachment by

a Court. It seems that all those provisions are intended to be reproduced by Cl. 5 of S. 19 of the Presidency Small Cause Act, which speaks generally of suits for declaratory decrees. In the case under notice, a claim had been preferred to movable property attached under several decrees; and after the claim was disallowed, a suit was filed to establish the claimant's right to the property. In regard to the attachments to which exception was not taken by a claim, the suit cannot be deemed to fall under S. 283, but may be regarded as one for a declaration. But the case as stated by the Chief Judge shows that the relief asked for was damages in respect of the attachment or the value of the goods. Having regard to the form of the prayer, there can be no doubt that it is a suit within the cognizance of the Small Cause Court.

**Shivrudrappa** *v.* **Balappa,** I. L. R., 23 B., 283. There can be no adverse possession during the continuance of the lease. Where the occupation is permissive and for a defined period, the possession of the occupant cannot become adverse. The right of the owner to possession arises upon the termination of the period of permissive occupation; and time runs from that date under Article 144. The principal must be the same, whether it is tenancy or permissive occupation for a term. Compare *Moideen Saiba* v. *Nagappen*, I. L. R., 7 B., 96.

**Dattaram** *v.* **Gangaram,** I. L. R., 23 B., 287. A mortgage by a guardian appointed under the Guardians Act, XX of 1864, and made subsequent to Act VIII of 1890 without the sanction of the Court appointing the guardian, is voidable at the instance of the party affected by it. The same view was taken by the Madras High Court in *Chinia Pillai* v. *Munisami Aiyar*, I. L. R., 22 M., 289. But the question remains whether the word "voidable" suggests that it would be avoided only on any of the grounds on which a contract could be avoided, or that it could be absolutely avoided by certain persons at their will and pleasure. We think the latter view is the correct one; and that is the interpretation which has been placed upon the same word occurring in S. 462 of the Civil Procedure Code, though the former interpretation has found favor with the Allahabad High Court in *Aman Singh* v. *Narain Singh*, I. L. R., 20 A., 98. See, however, *Arunachellam Chetty* v. *Meyyappa Chetty*, I. L. R., 21 M., 91.

**Bai Mangal** *v.* **Bai Rukhmini,** I. L. R., 23 B., 291. This is a case of some interest, and Mr. Justice *Ranade's* review of the authorities establishes the position that a widowed daughter is not entitled to be maintained in her father's family. There seems to be very little doubt that the sense of the community, though in favor of recognizing the

moral obligation, is not at variance with the law of the text books that there is no legal obligation.

**Rango v. Mudiyeppa**, I. L. R., 23 B., 296. This is an interesting case. It has been long ago held by the Allahabad High Court (see *Dharup Nath* v. *Gobind Saran*, I. L. R., 8 A., 614) that though there is a presumption of death in the case of a person who has not been heard of for seven years, there is no presumption as to the time of his death. In the case under notice, the plaintiff was adopted a year after the son of the adopting parent had ceased to be heard of, and the adopting parent's estate given to the plaintiff as filling the character of adopted son. If the natural son returned, the adopted boy was to have half the estate. In a suit brought more than seven years afterwards, it was held that the adoption had not been shown to be valid, because there was no presumption that the natural son had died before the adoption. But the Court turned round upon the defendant and said that he was bound to establish that the plaintiff did not fill the character of adopted son in virtue of which the estate was given to him. If the burden was rightly thrown upon the defendant to prove this, the decree was undoubtedly right. Chief Justice *Farran's* reasons for casting the *onus* on the defendant appear to us to be right.

**Fakirgauda v. Gangi**, I. L. R., 23 B., 307. A suit against the wife for joining her husband is a suit for restitution of conjugal rights. A suit against another who has the wife under his control or in his custody, is a suit for the recovery of the wife. In the case under notice, the suit was against the wife. It seems to us that in *Binda* v. *Kaunsilia*, I. L. R., 13 A., 126, Mr. Justice *Mahmood* effectively disposed of the contention that demand and refusal are an essential part of the cause of action. The provision of a period in the Limitation Act from demand and refusal cannot affect the substantive law of the Hindus or Mahomedans which does not require demand and refusal to give a right of action. Chief Justice *Farran* and *Candy*, J., observe that a minor wife cannot refuse. We know that a minor is incapable of contracting, and as her husband is her guardian, it cannot be said that the guardian's refusal is tantamount to the wife's. It appears to us that the wife may refuse even during minority. If so, time runs from that refusal.

There is a more important question, however, as to whether the cause of action is a continuing one. We are inclined to think it is. If so, it is difficult to reconcile it with Article 35 of the Limitation Act.

**Bai Jasoda v. Bamansha**, I. L. R., 23 B., 334. We are glad that the Bombay High Court has refused to follow the decision of the Allaha-

bad Court limiting the scope of S. 25 of the Small Cause Act to cases covered by S. 622, *Muhammad Bakar* v. *Bahal Singh*, I. L. R., 13 A., 277. We are also glad to note that when the High Court is rightly seized of the case under S. 25, the Court imposed no restrictions upon the nature of the order to be passed by the Court, but reversing the decree of the Small Cause Court, and passed a decree in favor of the plaintiff.

**Ram Nath Rai** *v.* **Lachman Rai,** I. L. R., 21 A., 193. The decision of the Allahabad High Court in *Bhawani Parsad* v. *Kallu*, I. L. R., 17 A., 537, that a decree against a Hindu father upon his mortgage in a suit to which the sons were not parties, cannot affect the sons' shares, is not, it appears to us, in accordance with the decisions of the Privy Council. Mr. Justice *Shephard* dissented from that decision in *Ramasamayyan* v. *Virasami Aiyar*, I. L. R., 21 M., 222, and another Division Bench of the Madras High Court has expressed its concurrence in the dissenting judgment of Mr. Justice *Bannerjee* in the Allahabad case. We have no doubt that the view of the Allahabad Court is erroneous, and we are glad to find the error somewhat minimised by the decision under notice that the sons are bound even though they are not made parties if they cannot show that the mortgage decree-holder was aware of their existence.

**Sibta Kunwar** *v.* **Bhagoli,** I. L. R., 21 A., 196. The decision in this case, upholding the maintainability of a suit against the assignee or heir of a certified purchaser, has the support of *Davies* and *Boddam*, JJ., in *Theyyavelan* v. *Kochan*, I. L. R., 21 M., 7. But we are unable to alter the opinion that we expressed in respect of that decision in 8 M. L. J., 135.

We cannot suppose that the Legislature intended any distinction between a suit against a certified purchaser and a suit against his heir.

**Kishan Lal** *v.* **Garuda Dhwaja Prasad Singh,** I. L. R., 21 A., 238. The suit in this case was by a mortgagee to enforce his mortgage. Part of the property included in the mortgage had been purchased in execution of a decree in the name of another person. The mortgagee contended that the mortgage was *benami* for the mortgagor. The question is raised whether S. 317 bars the suit. The plain answer appears to us to be that the mortgagee is claiming through the real purchaser against the certified purchaser. The mortgagee cannot get his decree upon the property unless it is first established that the mortgagor was the real owner; and such a case obviously falls within the language of S. 317. The learned Judges in the course of the judgment speak with approval of the decision in *Rama Kurup* v. *Sri Devi*, I. L. R.,

16 M., p. 290, by the *Chief Justice* and *Handley*, J. Those observations have not been accepted in later Madras cases, nor are they in accord with the remarks of the Privy Council in 14 M. I. A. 496.

---

## SUMMARY OF RECENT CASES.

*Res judicata—Civil Procedure Code, S. 13, expl. III—Suit for possession of land and mesne profits, past and future—Future mesne profits not granted—Subsequent suit not barred.*

### Ram Dayal *v.* Madan Mohan Lal.

*Held* that, where a suit has been brought for possession of immovable property and for mense profits both before and after suit, the mere omission of the Court to adjudicate upon the claim for future mesne profits will not, by reason of S. 13, explanation III, of the Code of Civil Procedure, operate as a bar to a subsequent suit for mesne profits accruing due after the institution of the former suit. *Mon Mohun Sirkar* v. *The Secretary of State for India in Council* (I. L. R., 17 C., 968), followed. *Jiban Das Oswal* v. *Durga Pershad Adhikari* (I. L. R., 21 C., 252); *Pratap Chandra Burna* v. *Rani Swarnamayi* (4 B. L. R., 113); *Julius* v. *The Bishop of Oxford* (L. R., 5 App., Cas., 214); *In re Baker* (L. R., 44 Ch., D. 262); *Bhivrav* v. *Sitaram* (I. L. R., 19 B., 532); and *Thyila Kandi Ummatha* v. *Thyila Kandi Kunhamed* (I. L. R., 4 M., 308) referred to. *Ramabhadra* v. *Jugannatha* (I. L. R., 14 M., 328) discussed. *Narain Das* v. *Khan Singh* (Weekly Notes, 1884, p. 158) overruled.

---

*Hindu law—Reversioners—Suit to set aside alienation by Hindu widow—Similar suit barred by limitation as against a prior reversioner—Suit by subsequent reversioner not thereby barred—Limitation—Act No. XV of 1877 (Indian Limitation Act), Sch. II, Art. 120.*

### Bhagwanta *v.* Sukhi.

*Held* that, where there are several reversioners entitled successively under the Hindu law to an estate held by an owner whose interest is limited, no one such reversioner can be held to claim through or derive his title from another, even if that other happens to be his father, but he derives his title from the last full owner. If, therefore, the right of the nearest reversioner for the time being to contest an alienation or an adoption by the limited owner is allowed to become barred by limitation as against him, this will not bar the similar rights of the subsequent

reversioners. *Beni Prasad* v. *Hardai Bibi* (F. A. No. 35 of 1888, decided February 4th, 1892); *Ramphal Rai* v. *Tula Kuari* (I. L. R., 6 All., 116); *Jumoona Dassya Chowdhrani* v. *Bamasoonderai Dassya Chowdhrani* (L. R., 3 I. A., 72) and *Isri Dut Koer* v. *Mussumat Hansbutti Koerani* (L. R., 10 I. A., 150) referred to. *Chhaganram Astikram* v. *Bai Motigavri* (I. L. R., 14 B., 512), and *Pershad Singh* v. *Chedee Lal* (15 W. R., C. R., 1) dissented from.

*Held* also that it is not essential to the applicability of S. 7 of the Indian Limitation Act, 1877, that the plaintiff claiming the benefit of that section must have been in existence and under disability at the time from which the period of limitation commences. *Siddhessur Dutt* v. *Sham Chand Nundan* (23 W. R., 285); *Morino Moyee Debia* v. *Bhoobun Moyee Debia* (23 W. R., 43); *Gobind Coomar Chowdhry* v. *Huro Chunder Chowdhry* (7 W. R., 134), and *Gobind Chandra Sarma Mozoomdar* v. *Mohan Sarma Mozoomdar* (2 B. L. R., 313) referred to.

---

*Practice—Appeal under the Workman's Compensation Act—Security for costs.*

## Hall *v.* Snowdon, Hubbard & Co. [1899] 1 Q. B., 593, C. A.

Appeals under the Workman's Compensation Act are not exempt from the application of the general rule of practice as to requiring security for the costs of appeal.

---

*Insurance—" Burglary and Housebreaking "—Theft—Entry by turning the door handle—Breaking open show-case—" Actual forcible and violent entry."*

## *In re* George and Goldsmiths and General Burglary Insurance Company, Limited [1899] 1 Q. B., 595, C. A.

Where a policy of insurance on stock-in-trade was expressed to be "against loss or damage by burglary and housebreaking *as hereinafter defined*," and by a subsequent clause the insurers undertook to make good to the assured any loss "by theft following upon actual forcible and violent entry upon the premises wherein the same is herein stated to be situate," it was *held* by the Court of Appeal in reversal of the judgment of the Division Court, that the loss of a quantity of jewellery which was got at by the thief by merely turning the handle of the unlocked outer door during a temporary absence of the servant was not covered by the policy as the entry could not be said to be *actually* "violent" or "forcible"

within the terms of the policy and that the breaking open of the show-case in which were the jewels could not be said to satisfy that clause of the policy, because it was only where the *entry* into the shop was "violent" or "forcible" that the assured was entitled to be indemnified under the terms of the policy.

---

*Practice—Action against firm—Death of partner after appearance—Defence of surviving partner, form of.*

**Ellis** *v.* **Wadeson** [1899] 1 Q. B., 714, C. A.

Where an action was brought against a firm consisting of two partners in the firm name and one partner died after writ and appearance, it was *held* that the right course for the surviving partner to take was not to put in a personal defence but to put in one for, and in the name of, the firm.

---

*Insurance—Concealment of material facts—" Uberrima gides."*

**Seaton** *v.* **Heath; Seaton** *v.* **Burnand** [1899] 1 Q. B., 782, C. A.

Where the defendants executed an instrument in the form of a policy of insurance whereby they agreed in consideration of a premium to guarantee the solvency of a surety for the repayment of a debt due to the plaintiff, it was *held* by the Court of Appeal that the duty to disclose to the under-writers material facts relating to the risk was not one peculiar to the contracts of marine, fire or life insurance but applied to all contracts of insurance and that the concealment of material facts by the plaintiff would afford a good defence to an action on the policy.

As there was no proof that there was a concealment of material facts, the case was sent down for retrial before a jury.

(See the observations of *Romer*, L. J., as to the difference between contracts of insurance and contracts of guarantee).

---

*Stock exchange—Payment of " differences "—Option to demand delivery or acceptance of stocks or shares—Wagering contract—Gaming Act 8 and 9 Victoria, Chapter 109, S. 18.*

*In re* **Gieve** [1899] 1 Q. B., 794, C. A.

Two stock and shareholders were dealing in stock on what is called the "cover" system. The sold note between them ran as follows:—"I beg to advise having sold to you 20 Canadas . . . . plus $\frac{1}{8}$ if stock is

taken up . . . . subject to conditions at back." The fifth condition was "It is to be distinctly understood that I am prepared to deliver the stock or shares to which this contract refers, if demanded, but require cash on the first day of the account for securities I have to deliver to customers." The question was whether the contract was one for payment of 'differences' and whether it was void as a contract "by way of gaming or wagering" under S. 18 of the Gaming Act of 1845. It was contended that the contract was not one for payment of differences, and that even if it was, the buyer had the right to turn it into a lawful agreement for sale.

It was held by the Court of Appeal (*Lindley*, M. R., and *Rigby*, and *Vaughan Williams*, L. JJ.,) in reversal of the decision of *Wright*, J., that the contract was really for payment of differences and not for sale of stock, that thus the transaction being really by way of wagering or gaming was void under S. 18 of the Act and that the option given to the buyer to call for delivery and turn it into what may seem an ordinary sale of stock did not make matters any better.

---

*Administration—Purchase of shares from testator—Misrepresention—Claim for damages for deceit—Unliquidated damages—'Actio personalis moritur cum persona.'*

*In re* **Duncan—Terry** *v.* **Sweeting** [1899] 1 Ch. 387.

Where the purchaser of certain worthless shares from a testator, without repudiating the sale and throwing up the shares, claimed to prove in an administration action against his estate for damages which he assessed at £250, the price he paid for the purchase of the shares, it was held by *Romer*, J., that the claim was not to pursue the claimant's money in the hands of the executors, but was legally one for unliquidated damages, notwithstanding that the claimant may eventually be able to prove that the measure of damages was exactly the price paid for the shares, and that since *actio personalis moritur cum persona*, the claim against the executors could not be sustained.

---

*Company—Unauthorised borrowing—Application of the money in payment of debts of the Company—Subrogation.*

*In re* **Wrexham, Mold and Connah's Quay Railway Company** [1899] 1 Ch. 440, C. A.

Where a Railway Company, which had only limited borrowing powers had exhausted its powers, and afterwards borrowed money and applied the same in reduction of debts due by it, it was held by

the Court, consisting of the Master of the Rolls and *Rigby* and *Vaughan Williams*, L. JJ., that the loan being *ultra vires*, the lender could not be subrogated to the securities of the creditor paid with his money so as to have priority over the other secured creditors of the Company; but that in so far as the money was applied in payment of the debts of the Company since the borrowing powers could not be really said to have been exceeded, the lender would in equity be entitled to stand in the same position as if his advance had been a valid one.

---

*Practice—Parties—Representative action—Action on behalf of the class of the public—Rules Order XVI, r. 9, Order XXV, v. 5.*

**Ellis *v.* Duke of Bedford** [1899] 1 Ch. 494, C. A.

The first question that arose in this case was, whether the six plaintiffs could sue on behalf of themselves and all other growers of fruit, flowers, vegetables, roots or herbs within the meaning of 4 Geo. IV, Ch. 113? *Wright*, J., held that the growers as a class had no common beneficial proprietary right under the Act; that therefore the plaintiff could not bring an action as representing a class, and that such right as the growers as a class possessed under the Act being in the nature of a public right, the action should, in order to be properly constituted, have been brought in the name of the Attorney-General. As to the further question whether, as far as the action related to the claims of the plaintiffs as individuals, they were rightly joined in one suit, he said that the claim of each was distinct and constituted a separate cause of action, and that since they did not arise in respect of the same transaction or series of transactions, they could not be joined in one suit. He, therefore, gave the plaintiffs liberty to continue the action on behalf of any one plaintiff so far as he sought any relief as an individual.

The plaintiffs appealed. The Court of Appeal (*Lindley*, M. R., and *Rigby*, L. J., *Vaughan Williams*, L. J., diss.) held that a *boná fide* question in which the class of growers was interested having been raised by the plaintiffs, there could be no objection to the plaintiffs maintaining the action on behalf of themselves and the other growers, but that the Attorney-General must be joined as a party to the case, in order to represent the interest of the public which might be interested in disputing the rights claimed by the plaintiffs.

On the other hand, *Vaughan Williams*, L. J., concurred with *Romer*, J., in holding that the growers having no community of interest the subject-matter of the action, the plaintiffs could not bring a

representative action, but held that, if they could bring such an action, the Attorney-General was a necessary party to the suit.

---

*Riparian owner—Interruption of the stream—Local authority—Injuriously affecting—Consent of riparian owner—38 and 39 Vict., Ch. 55, S. 332.*

**Roberts v. Gwyrfai District Council** [1899] 1 Ch. 583.

Where a local authority constructed a dam across a lake and increased the storage of water, in order to supply water to a neighbouring district under the Public Health Act, and a riparian owner brought an action for injunction restraining the local authority from taking water from the lake or from doing any other act whereby the flow of water by the plaintiff's lands might in anywise be diminished, it was held by *Kekewich*, J., that the defendants were "injuriously affecting" the stream within the meaning the words in S. 332 of the Act; and that since they had neither the permission of the plaintiff which S. 332 required, nor any compulsory powers under the Act to interfere with the free flow of the stream, an action could be maintained against them, even though no perceptible damage was proved.

---

*Administration, decree for—Right of retainer—Form of the Administration Bond.*

**Davies v. Parry** [1899] 1 Ch. 602.

The question raised in this case was, whether after a decree for administration had been made at the instance of other creditors, and the *administrator de bonis non* had executed a bond undertaking to "well and truly administer according to law (that is to say) pay all and singular the debts which he did owe at his decease in the due course of administration rateably and proportionably" and "according to the priority required by law and not unduly preferring his own debt or any other of the debtors of the said deceased by reason of his being an administrator as aforesaid", the administrator could still exercise his right of retainer. *Romer*, J., held that, according to *Nunn* v. *Barlow*, (1824) 1 S. and S. 588 and a long series of authorities following it, it was well established that the administrator had the right of retainer, even though a decree for administration had already been passed at the instance of other creditors; and that the bond being in common form could not be said to have taken away from the administrator the usual right of retainer, that even taking the words of the bond itself, it only restrained the administrator from giving an illegal or undue preference to his own or any other debt;

and where a long series of decisions had pronounced in favour of the legality of the right of retainer, it could not be said to be either an illegal or undue preference, and that the administrator was within his rights in retaining the debt due to himself.

---

*Company—Prospectus—Statement that Directors will take shares not taken by vendor—Estoppel.*

*In re* **Moore Brothers and Company, Ld.** [1899] 1 Ch. 627, C. A.

In the prospectus approved and issued by the Directors of the Company a statement was made to the effect that the Directors would take all the shares not taken by the vendors. The vendors took all, except 367 shares. These shares were never afterwards allotted to any of the Directors; nor were their names registered as the holders of such shares. In the course of the winding-up, the liquidator applied to the Court and got an order that the Directors (except this defendant) were liable to calls in respect of the 367 shares not allotted to anybody. Subsequently the liquidator also obtained another order from the Court affirming this defendant's liability in respect of those shares. On his application to *Wright*, J., to discharge the order, he held that if the question arose between the Director and one who had taken shares on the strength of the representations contained in the prospectus, the Director would be estopped from denying his liability, that the question arising merely between the Director and the Company, his representations to the public made in the prospectus could not be said to operate as estoppel; but that since the Director had accepted office on the terms of the prospectus and had, so to speak, acted upon them, it must be held that he impliedly agreed to take the shares. He therefore refused to discharge the order.

On appeal the Court (*Lindley*, M. R., *Rigby* and *Vaughan Williams*, L. JJ., held that the language of the prospectus did not amount to an undertaking on the part of the Directors to jointly take the unallotted shares, that at best it could amount only to an expression of intention that the Directors would, if no one took the shares, arrange in some way to distribute them among themselves, that as rightly held by *Wright*, J., there was no estoppel between the Directors and the Company, and that no contract between them could be implied from the terms of the prospectus as it was clear from the fact the Company would not be bound to allot the shares to them even if they had insisted upon it.

---

*Practice—Decree against Company—Secretary ordered to file accounts—No service upon the Secretary—Attachment of Director.*

**McKeown v. Joint Stock Institute** [1899] 1 Ch. 671.

Where an order of the Court directing a Company to render accounts to the plaintiff was not complied with and an application was made asking the Court to send the Director to prison for wilful disobedience to the order of the Court, it was held by *North*, J., that no writ of attachment could be issued against him, unless and until he had been personally served with the order which had been disobeyed.

---

*Trade-mark—Unregistered mark—Imitation of get-up—Application for interlocutory injunction—Misrepresentation by the use of the word "trade-mark"—46 and 47 Vict., Ch. 57, S. 105.*

**Sen Sen Company v. Britten** [1899] I Ch. 692.

The plaintiffs, an American Company, dealing in cachous for the voice, marked their packages with the words "Sen Sen" above and the words "Trade Mark" just below them. The mark was not registered in England. An English Company imitated their get-up and used the same words, except that they marked their packages with the addition '5 C'. In an action under the Common Law to restrain the English Company from imitating their get-up and passing off their article as that of the plaintiffs, an application was made for the issue of an interlocutory injunction against them. It was contended for them that the plaintiffs, having by the words 'trade-mark' upon the packages misrepresented to the public that their trade-mark was registered, had committed a crime under S. 105 of the Act and were not entitled to any relief. It was held by *Stirling*, J., that the use of the words trade-mark did not necessarily imply that it was registered so as to come within the clutch of S. 105 of the Act, and that, apart from that section, they were not guilty of such misrepresentation as would deprive them of their right to an injunction.

---

*Prescription—Ancient lights—Greenhouse—Building—Prescription Act 2 and 3 Will. 4, Ch. 71, S. 3.*

**Clifford v. Holt** [1899] 1 Ch. 698.

In this case a question was raised as to whether a greenhouse was a building within the terms of S. 3 of the Prescription Act so as to have a right to light by Prescription. It was held by *Kekewich*, J., that it was

a building within the Act, and that the interference with its ancient lights could be restrained by injunction. *Harris* v. *DePinna* (1886) 33 Ch. D. 238 considered.

---

*Will—Issue—Children—Context to show that issue means children in many clauses—No such context in another clause—Construction.*

*In re* **Birks—Kenyon** *v.* **Birks** [1899] 1 Ch. 703.

A testator made gifts to legatees and to their *issue* in case they should die in his lifetime. In a number of these clauses the testator had used such words as 'parent' or 'child' or 'children' to show that the gift over was confined to the children of the legatees only. In the 11th clause, with reference to which the question arose, no such words were used, and the clause ran as follows :—"I bequeath to my cousin, John Birks Pigott, the legacy or sum of £5,000; but in the event of his death in my lifetime leaving lawful *issue*, I direct that the said legacy shall not lapse, but such *issue* shall have and be entitled thereto in equal shares and proportions." The question was, whether the gift over was confined as in other clauses to the children merely or extended to children's children, &c., also? It was held by *Kekewich*, J., that there was no ground to suppose that the testator intended to use the word "issue" in this clause in the same sense in which he used it in the other clauses, and that in the absence of anything in the will to show that wherever he used the word 'issue' he meant only children, the express words of the legacy could not be controlled by any supposed intention to use the word to denote children merely.

The canon of construction in *Ridgeway* v. *Munkitbrick* (1841) 1 D. and War. 84, 93, and *Rhodes* v. *Rhodes* (1859) 27 Beav. 413, 417 dissented from. *In re Warren's trusts* (1884) 26 Ch. D. 208, 216 followed.

---

*Guardian and minors—"Maintain, educate and bring up"—Immoral home—Power of Court to interfere.*

*In re* **G. (Infants)** [1899] 1 Ch. 719.

A testator settled certain trust estates "upon trust to pay the annual income . . . . to my said wife during her life if she shall so long continue my widow, she maintaining, educating and bringing up such of my children as shall be under 21 . . . . and of maintaining such of my daughters as being of the age of 21 years shall not be or have been married". The mother who was bringing up the children

was living in adultery with a married man in the very house in which they were being brought up. The question was, whether she was not guilty of breach of trust and whether the Court could make any order as to the funds? *Kekewich*, J., held that the mother was guilty of breach of trust in bringing up the children in the house in which she was herself living in adultery with a married man, and that since it was clear from the will that the testator intended to provide for the children's maintenance out of the income granted to the widow for life, the Court could administer the estate and distribute the income in some equitable proportion between the mother and her minor children.

## JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the receipt of the following publications:—

*Sind Sadar Court Reports*, Vol. I., No. 1. Edited and published by Nihalchand Gidumal, B.A., LL.B., Karachi. Subscription, Rs. 10.

*Index of Cases reported in the Indian Law Reports, Madras Series,* 1876—1898, by Dharm Das. Sari Printed at the *Caxton Press, Lahore.*

*A Guide to Best on Evidence.* Printed by Ramasami Chetty and Co. Madras:—*Price*, Rs. 2-8-0.

The Bombay Law Reporter for July (*in exchange*).
The Albany Law Journal for July (*in exchange*).
The Calcutta Weekly Notes for July (*in exchange*).
The Allahabad Weekly Notes for July (*in exchange*).
The Green Bag for July (*in exchange*).
The Canadian Law Times for July (*in exchange*).
The Canada Law Journal for July (*in exchange*).
The Ceylon Law Review, Vol. I, No. 3 (*in exchange*).

***

*Pleaders as Directors.*—It appears that the High Court, or to speak more correctly, the Vacation Judge, Mr. Justice *O'Farrel*, has ruled that if a pleader is a director of a Fund, he will be deemed to be carrying on business within the meaning of the rule framed by the High Court prohibiting a pleader from carrying on a trade or business except with the leave of the High Court. If the rule in question is to have this wide interpretation, we think it is open to serious objections. In the present state of the country if the Joint Stock Companies, commonly called Funds, are not to some extent under the control of men versed in the law,

it is impossible that these Companies should be efficiently managed. Even in the Presidency-Town, we have seen how very difficult it is to manage the business of a Fund without competent legal assistance on the direction. Nor can it be correctly styled in common parlance that a lawyer director of a Fund who assists in the deliberations of the Committee carries on a business. We hope that a proper representation will be made on the subject to the Honorable Judges on the hardship and inconvenience likely to be caused by the rule in question if interpreted as it has been by the Vacation Judge.

***

*A Novel Procedure.*—In a recent prosecution of the Editor of the *Madras Standard* by the Hon. Mr. V. Bhashyam Aiyangar for defamation, a question of practice of considerable importance arose. When summons was applied for, the Chief Presidency Magistrate issued notice to the accused to show cause why summons should not be issued. We think there is no warrant for this procedure under the present Criminal Procedure Code. There are two alternative courses open to the Magistrate upon the complaint being preferred. Under S. 202 if the Magistrate is not satisfied as to the truth of a complaint, he may postpone the issue of process and make an enquiry himself or direct a local investigation for the purpose of ascertaining the truth or falsehood of the complaint. Upon the result of such inquiry or investigation he may dismiss the complaint unless there is sufficient ground for proceeding. The other alternative is under S. 204 where the Magistrate instead of not being satisfied as to the truth of the complaint sees sufficient ground for proceeding. In that case, he *shall* issue a summons for the attendance of the accused. The rest of the procedure after summons was issued is a trial which may end in an acquittal or a conviction. There is no third alternative provided by the Code. Where the Magistrate cannot say he is not satisfied as to the truth of the complaint, it is not competent to him to issue a notice to the accused to show cause why summons should not be issued. The practice, however, of issuing such notices seems to obtain in the Presidency Magistrates' Court; and it is a question, as observed by Mr. Clarke, the Chief Presidency Magistrate, whether such a practice ought not to be discontinued.

***

*Indian Judges.*—The Lord Chief Justice has declared on several occasions that the salary of a Judge of the High Court is inadequate. The increase in the salaries of the Puisne Judges of the High Courts of

India may induce him when occasion offers to emphasise his belief that the remuneration of English Judges ought to be increased. The addition to the salary of the Indian Judge is, however, very slight; he is to receive Rs. 48,000 instead of Rs. 45,000 per annum. Whether this increase is large enough to effect any improvement in the calibre of the Indian Bench is doubtful in the extreme. What is more likely to prove attractive is the reduction of the period of service that qualifies a Judge for a pension from fourteen years and-a-half to eleven years and-a-half :—*The London Law Journal.*

***

The question of improving the position of the Judges of the several High Courts in India has recently been engaging the attention of the Secretary of State for India in Council, and on April 27th last he addressed a despatch to the Government of India informing them that the following changes had been decided upon. In future the salary of a Puisne Judge of a High Court in India will be Rs. 48,000 instead of Rs. 45,000 per annum. The salaries of the Chief Justices, however, remain unchanged, *viz.*, Rs. 72,000 per annum for the Chief Justice of Bengal and Rs. 60,000 per annum for the Chief Justice of Madras, Bombay and North-West Provinces. Every Chief Justice or Judge appointed to a High Court in India will be called upon to resign his office on attaining the age of sixty years. The pensions will remain as at present, *viz.*, £ 1,800 per annum for the Chief Justice of Bengal, £ 1,500 per anuum for the Chief Justices of the other three High Courts, and £ 1,200 per annum for Puisne Judges. But the period of actual service required by a Chief Justice or a Puisne Judge for earning his pension has been reduced from fourteen and-a-half to eleven and-a-half years. If at any time after six and three-quarter years' service, but before he has served for eleven and-a-half years, a Judge is compelled to retire through ill-health, he will receive half the pension which he would have received if he had completed his full term of office :—*The London Law Journal.*

***

*Women as Lawyers.*—The interesting comment upon the decision of the French Chamber to allow a woman to practise as an advocate in the French Courts is to be found in a complaint made by an American lady at the Women's Congress, that women, though allowed to practise as lawyers in the United States, are not permitted to act as Judges. The complaint is sufficiently logical to render it desirable that the thin end of the wedge should not be admitted :—*The London Law Journal.*

***

*Insurance—Health of insured.*—In *Barnes* v. *Fidelity Mut. Life Ass'n.*, decided in the Spreme Court of Pennsylvania in May 1899 (43 Atl. R., 341), it was held that whether an insured, who, at the time of the payment of his premium and delivery of the policy, was in bed with a cold which developed into pneumonia, causing his death two days later, was in "good health," within the meaning of the policy, was a question for the jury.

The Court said in part:

As stated by a learned text writer, the term "good health" does not mean absolute perfection, but is comparative. The insured need not be entirely free from infirmity or from all the ills to which flesh is heir. If he enjoys such health and strength as to justify the reasonable belief that he is free from derangement of organic functions, or free from symptoms calculated to cause a reasonable apprehension of such derangement, and to ordinary observation and outward appearance his health is reasonably such that he may with ordinary safety be insured, and upon ordinary terms the requirement of "good health" is satisfied. Slight troubles, temporary and light illness, infrequent and light attacks of sickness, not of such a character as to produce bodily infirmity or serious impairment or derangement of vital organs, do not disprove the warranty of good health. In other words, the term "good health," when used in a policy of life insurance, means that the applicant has no grave, important or serious disease, and is free from any ailment that seriously affects the general soundness and healthfulness of the system. A mere temporary indisposition, which does not tend to weaken or undermine the constitution at the time of taking membership, does not render the policy void (3 Joyce, Ins., $. 2004). "Colds are generally accompanied with more or less congestion of the lungs, and yet in such a case there is no disease of the lungs which an applicant for insurance would be bound to state." (*Cushman* v. *Insurance Co.*, 70 N. Y. 77). It is unnecessary to refer in detail to the evidence. It was clearly sufficient to warrant the submission of the case to the jury on the question of the "good health" of the insured at the time the premium was paid, and the policy delivered to plaintiff, and other subordinate questions of fact in dispute. This is especially so in view of the fact that the evidence was more or less conflicting on all material questions of fact. The case was clearly for the jury (*Smith* v. *Insurance Co.*, 183 Pa. St. 504, 38 Atl. 1038; *Keatley* v. *Insurance Co.*, 187 Pa. St. 197, 40 Atl. 808):—*The Albany Law Journal.*

***

A physician was acquitted recently in England for riding a bicycle on a sidewalk, because of an old law that gives a doctor the right to take the shortest cut when on his way to an urgent case. :—*The Albany Law Journal.*

***

The following extracts are taken from an article in the American Law Review :—

*Trial by Judge and Jury.*—Lord Hobhouse in an address showing the necessity for jury trials said : " It seems to me that juries have kept our laws sweet; they have kept them practical ; they still do so; they are like the constant, unseen, unfelt force of gravitation which enables us to walk on the face of the earth instead of flying off into space. Certainly nothing can be more important to the welfare and coherence and strength of the nation, than that its laws should be in general harmony with its convictions and feelings. * * * Juries are passing every day innumerable decisions, each of them very small, but constant, ubiquitous, and tending to carry superfine laws down into practical life so as to make them fit for human nature's daily food."

* * * * *

It is said jury trials protract litigation, but the errors that lead to new trials, and appeals and writs of error and the reversals of judgments and protraction of litigation are the errors of the Judges. Look into the reports and you will find that in the trial of commonplace cases the trial court is charged with the commission of from five to fifty errors of law, and frequently convicted on some of the charges. And the errors of Judges are not limited to the courts of original jurisdiction. The appellate courts themselves are constantly falling into error. If one is curious to know the extent of these errors, let him consult Bigelow's Overruled Cases, where he will find that appellate courts, as far back as 1873, had overruled nearly ten thousand of their own decisions. How many they have overruled since that time is not known. These are their confessed errors only, there still remain, we know not how many errors not yet confessed, for Judges are like all great sinners,—never confess their errors until *in extremis*,—and not then with that openness, fulness, and frankness supposed to be essential to insure spiritual salvation to a sinner.

* * * * *

The juries, equally with the Judge on the Bench, are Judges, and as supreme and independent in the exercise of their jurisdiction as he is in his. The errors of both may be corrected in the orderly mode provided by law, and both may be impeached and removed from office for

corruption, but neither has a right to summarily impeach or remove the other from his office for a supposed error in discharging his or their duty. Let the case be reversed: Suppose whenever the Judge errs in deciding the law, he was summarily ordered to step down off the Bench. What would be the result? Not one single Judge's Bench would be occupied next Monday; it is certain that this (the lower court's) bench would be vacant, for the Judges who sit here have been convicted of repeated errors by the Supreme Court. Judges make hundreds of mistakes in deciding the law where the jury makes one in deciding the facts; and when juries do err, it is commonly owing to the mistake of the Judge instructing them erroneously or inconsistenly on the law. A jury after receiving a two-sided charge from the Judge were unable to agree, and when they were discharged, the Judge asked them how they stood, to which their foreman replied: "Just like your Honor's charge, six to six." When the Judges learn to decide the law with as much accuracy and fidelity as juries do the facts, it will be time enough for them to indulge in censorious criticism of the jury for their supposed mistakes. Such action is not only a gross invasion of the rights of the jury, but it is an invasion of the constitutional rights of the suitor who is entitled to have a jury in the box who will not be influenced in any degree in the honest and independent exercise of their own opinion by fear of censure, or the hope of applause from the Judge. The free, independent mind has one opinion, and the trammelled, dependent mind another opinion; and the free, independent mind is what every suitor is entitled to have in the jury box.

***

*Lord Lytton's Description of Daniel O'Connell addressing an out-door Meeting.*—The following poem, often lost, often sought for, generally misquoted, has been recently rediscovered and brought to light by J. W. Clark, Esq., in an article entitled "Law and Lawyers," published in the *American Lawyer* for January. Allowing for variations made by the copyist and possible changes made by the author in different editions of his work, it is the real thing:—

Once to my sight the giant thus was given,
Walled by wide air and roofed by boundless heaven.
Beneath his feet the human ocean lay,
And wave on wave flowed into space away.
Methought no clarion could have spent its sound,
Even to the center of the hosts around;
And, as I thought, rose the sonorous swell,
As from the church tower swings the silvery bell.

Aloft and clear, from airy tide to tide
It glided easy as a bird may glide;
To the last verge of that vast audience sent
It played with each wild passion as it went.
Now stilled the uproar, now the murmur stilled,
And sobs or laughter answered as it willed.
Then did I know what spells of infinite choice
To rouse or lull has the sweet human voice;
Then did I seem to see the sudden clue
To the great troublous Life Antique, to view,
Under the rock stand of Demosthenes,
Mutable Athens heave her noisy seas.

***

*Sentence of Death pronounced by Judge Kirby Benedict on Jose Maria Martin, convicted of Murder in Toas Co., N. M. in* 1858.—Judge Benedict said: "Jose Maria Martin, stand up. You have been indicted, tried, and convicted by a jury of your countrymen of the crime of murder, and the court is now about to pass upon you the dread sentence of the law. As a usual thing, Jose Maria Martin, it is a painful duty of the Judge of the court of justice to pronounce upon a human being the sentence of death. There is something horrible about it, and the mind naturally revolts from the performance of such a duty. Happily, however, your case is relieved of all such unpleasant features. The court takes a positive delight in sentencing you to death. You are a young man, Jose Martin, apparently of good constitution and robust health. Ordinarily, you might have looked forward to many years of life, and the court has no doubt you have, and expected to die in green old age, but you are about to be cut off in consequence of your own act. Jose Maria Martin, it is now the spring time. In a little while the grass will be springing up green in these beautiful valleys and these broad mesas, and on the mountain sides. Flowers will be blooming, birds will be singing their sweet carols, and nature will be putting on her most attractive robes, and life will be pleasant, and men will want to stay. But none of this for you, Jose Maria Martin. The flowers will not bloom for you, Jose Maria Martin. The birds will not sing their sweet carlos for you, Jose Maria Martin. When these things come to gladden the sense of men, you will occupy a space six by two beneath the sod, and the grass and these beautiful things will be green, growing above your lowly head. The sentence of the court is that you be taken from this place to the county jail. That you be safely kept and securely confined in the custody of the sheriff until the day appointed for your execution. Be

very careful, Mr. Sheriff, that he have no opportunity to escape, and that you have him at the appointed place, at the appointed time. That you be so kept, Jose Maria Martin, until—'Mr. Clerk, upon what day of the month does Friday, about two weeks from this time, come?' 'March 22nd, your Honor.' 'Very well, until Friday, the 22nd day of March, when you will be taken by the Sheriff from your place of confinement to some safe and convenient spot within the county, and that you be there hanged by the neck until dead.' And the court was about to add, Jose Maria Martin, 'May God have mercy on your soul;' but we will not assume the responsibility of asking an All-Wise Providence to do that which a jury of your peers have refused to do. The Lord could not have mercy on your soul. However, if you affect any religious belief, or if you are connected with any religions organization, it might be well for you to send for your priest or your minister and get from him, well, such consolation as you can; but the court advises you to place no reliance on anything of that kind. Mr. Sheriff, remove the prisoner."

The sequel of the above remarkable sentence is interesting, in that Jose Maria Martin "escaped from the county jail" and several years afterwards peacefully met his death in Lincoln County, by falling backward out of a wagon and breaking his neck.—E. L. B.:—*The American Law Review.*

***

*The Generosity of Lawyers.*—Judge Richardson of the Superior Court of Massachusetts, in response to the Bar of Essex County upon the presentation of a memorial of Thomas M. Stimpson, of Peabody, at a recent meeting of that Bar said:—

Forty-five years in the practice of law! What a fund of interesting knowledge of all kinds he must have acquired! What a store of family confidences! What a treasure of interesting personal reminiscences of the great men whom he met and knew at this Bar he must have had. And then during that period what feuds and contentions he has allayed, what suits averted, what reconciliations brought about, how much useless litigation saved! I cannot conceive a place or field where a man of the proper qualifications and of the right spirit and temper, and having the confidence of the community, can render more or better service to his fellow-men than in such a field and practice as that. Some other professions and callings occasionally bring men into close relations; the physician has many family secrets, the minister has parish confidences, but no other calling or profession brings men into so close a touch, or so intimate and sympathetic relations as the profession of law. When his

client's honor, or his life, or liberty or rights to property, or anything which he values in life, is assailed or threatened, to whom does he go? To whom so unreservedly lay open his heart, and so fully expose his troubles and burdens, whatever they may be, as to his lawyers?

It is the fashion in some places to charge the profession with selfishness, and it may be, probably is, true that few lawyers make, or can make, an exhibition of charity in the shape of testamentary bequests. Few of them leave large estates, and they may not care with money laboriously earned to leave it to the chance of its being perverted and used.

"To endow a college, or a cat."

But there is much genuine charity besides bequests of gifts of money. What good lawyer of ten years' practice has not often given his time, his advice, and services, to the extent of trials in court, to poor persons from whom he had no expectation of compensation? And when the welfare of his neighborhood or town is in any way in jeopardy, or when a proposed public improvement is to be promoted, who, as much as the lawyer of the neighborhood or town, is expected to gratuitously contribute his time and talents to it? Lawyers more than any other men give direction to public affairs; they are an essential and conspicuous part of the machinery of administering the law; and the respect in which the law itself is held depends much upon the character of the Bar:—*The American Law Review.*

***

*Trials: Actions for Damages for Physical Injuries—Right of Examination of the Body of the Person injured.*—In the case of *Chicago &c. R. Co.* v. *Langston*, 48 (S. W. Rep. 610), the Civil Court of Appeals of Texas hold that where the plaintiff, in an action for damages for personal injuries, has exhibited her legs in the presence of the court, and physicians who have examined them have testified for her that she would not be able to wear artificial legs, defendant is entitled to have an examination by experts of its own selection, for the purpose of testifying on the same point, though they are in its regular employment as surgeons:—*The American Law Review.*

***

*Trial by Jury: Propriety of an Instruction urging the Jury to agree.*—In the case of *People* v. *Engle* (76 N. W. Rep. 502), recently decided by the Supreme Court of Michigan, the defendant was prosecuted for

selling a bottle of beer contrary to the statute law restricting the sale of intoxicants. After the jury had been out all night deliberating upon the case, they came into court and announced that they were unable to agree upon a verdict. The court then asked "Do you think you have exhausted every reasonable effort to agree? The foreman; Yes, sir; we have been over the testimony several times. The court: I was very sorry, gentlemen, that you were obliged to remain out all night with this case. The work of a jury is hard enough if it only works when court is in session, without having to be out all night; but the interests of both the people and the respondent are important in this case, and it is very important that you should, if possible under the testimony, agree upon a verdict. Now, I have no doubt that you have done just as your foreman says—gone over the testimony very carefully and concientiously, and endeavoured to agree upon a verdict, so far as you have been able to: but, perhaps on further reflection, you may be able to do so. I certainly hope so. Now, I make this suggestion: I have no doubt that each side has used all the powers of persuasion, that of the individual jurors, to convince his fellow-jurors of the case as it looks to him. Now, suppose you go out and try the reverse, and let each of you try as hard as you can to be persuaded instead of trying to persuade the others. Try and persuade yourselves, those who do not agree with their fellow-jurors, and see if, looking over the testimony carefully and listening to all the arguments that those who do not agree with you may use, you cannot come to the same verdict. In view, as I have said, of the importance of the verdict in this case, I do not feel like discharging you at this time. It is now early in the morning. You have had your breakfast. Make yourselves as easy and comfortable as you can, and think the matter over carefully. Divest yourselves of all sorts of preconceived opinions about the case on either side up to this time. Start right in now just as if you had first gone out, and see what you can do. You may again retire, gentlemen." Within an hour after this charge, the jury returned a verdict of guilty, but with the recommendation that the court fix the punishment or fine as light as the law would allow in such cases. The Supreme Court held that the giving of this instruction was error, on the ground that it had a tendency to make the jurors, who were holding out for the defendant, fear that they must give way to their honest convictions upon the merits and agree with the others, although they might have a reasonable doubt as to the guilt of the defendant. The court distinguished a leading Massachusetts case (*Com* v. *Tuly*, 8 cush, Mass) on this question, on the ground that although in that case somewhat similar advice was given to the jury, yet they had been

previously instructed that the verdict to which a juror agrees must be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusion of his fellows; whereas in the case at Bar there was no such instruction :—*The American Law Review.*

* * * * *

*Attorney at Law: Touting—Barratry—Soliciting cases "on shares"—No recovery of fee in such cases.*—Just how far an attorney can go in soliciting employment on a contingent fee was discussed by the Supreme Court of Minnesota in *Gammons* v. *Johnson*, decided April 26th. The plaintiff in that case sent agents through certain counties in the northern and western part of Minnesota to seek claims and institute suits against the Great Northern Railroad Company for damages resulting to different persons from the failure of the Railroad Company to fence its track across the land of such persons, and to procure the bringing of suit by such persons against the Railroad Company. Blank contracts were furnished under which the attorney was to be employed, and seventy-one persons were induced to make such contracts. Suits were brought in the seventy-one cases for from $400 to $1,500, but all except one or two were settled before trial by the Railroad Company with the landowners for from one to five dollars each. It was alleged that the persons would not have brought these suits but for the labors of the attorney. Action by the attorney on some of these written contracts was begun, and the latest case is the third which has been before the Minnesota Supreme Court. The court holds that the attorney cannot recover under the circumstances disclosed by the answer. The opinion of one of the concurring Judges says: "It is somewhat unprofessional for an attorney to solicit employment at all, more especially so when he expects to take the case 'on the shares;' and it is still more unprofessional for him to solicit employment in a case when he expects to take 'on the shares,' and which he has good reason to believe would never be brought at all, were it not for his solicitation." But an isolated or casual solicitation of employment in a case of this kind is not so highly unprofessional that the court would refuse to aid the attorney in recovering remuneration for his services in the case. The great and crying evil which the courts should condemn most strongly is making a practice of soliciting such cases. An attorney who does this should, in my opinion, be disbarred; and surely he should not be rewarded by aiding him to recover remuneration for doing the very act, or one of the series of acts, for which he should be disbarred. On the plainest principles of public policy, the courts should condemn the practice of the 'ambulance chasers' and 'prowling assignees' who thus stir up

litigation, and should refuse to aid them in recovering fees in such cases":—*The American Law Review.*

***

*Custody of children : Right of parents to reclaim their children from a Charitable Institution after becoming fit to have their custody.*—The New York Supreme Court has, within a few weeks, carried out the common-sense opinion, delivered April 18th, by the Court of Appeals in the matter of Knowack (158 N. Y. Rep. 482.) The petitioners in that case, Charles Knowack and Johanna his wife, sought to obtain the custody of their four children who were held by the Children's Aid Society of Rochester. The children, who were under thirteen years of age, had been for over two years in the custody of the society as a result of proceedings begun on the ground of the intemperance and neglect of their parents. When the commitment was made it was shown that the parents were not qualified to take care of the children. But in the later proceedings they declared, and the allegation was not controverted, that they had been for more than two years sober and industrious, were earning good weekly wages, had a substantial bank account, were free from debts, and in comparatively independent circumstances for persons in their station of life. Affidavits corroborating these statements were submitted; but the Children's Aid Society declared that when a child was finally committed to a charitable institution under the Penal Code, there was no way by which the institution could be deprived of its custody except by the consent or in consequence of the misconduct of the institution itself, unless the commitment were successfully attacked by appeal or by *habeas corpus* proceedings. The court held, however, that the Supreme Court of the State of New York having the chancery jurisdiction of the old Court of Chancery in England, had power to intervene and restore the children to the custody and care of their parents. "It certainly is," says Judge Bartlett: "A most startling doctrine that a child who is a public charge and has been committed for such reasons as are disclosed in this case, cannot be restored to parental care and control, where conditions have changed and are such that neither in law nor morals the separation of parent and child should be continued. * * * Stripped of all form and technicality, we have this situation: Intemperate parents are deemed to be unfit custodians of their children, and the State steps in and cares for and supports them for the time being. It now appears that the parents have reformed, are living honorable lives, and are abundantly able to care for their children. It seems evident that public policy and every consideration of humanity demand the restoration of these children to parental control. If the Court of Chancery can

interfere and take the child from the custody of its parents, it can also intervene and restore it to their care in the exercise of the same discretionary power." :—*The American Law Review.*

# REVIEWS.

*The Indian Stamp Act* with Notes, by C. V. Visvanatha Sastri, B.A., B.L., printed by *The Vijayanti Press*, Madras.

Mr. Visvanatha Sastri's new book on the Stamp Act is neatly printed. We must congratulate the *Vijayanti Press*, on the excellence of its work. Throughout the book wherever reference is made to the General Clauses Act, the Acts of 68 and 87 are referred to and the author does not seem to have been aware of the General Clauses Act, X of 1897. The author has, no doubt, collected cases, but he has not even told us how far decisions under the old Act are still law under the amended wording of some of the sections. Cases are cited such as the decision in I. L. R., 4 C., 829, which have no longer the force of law. The note on p. 78 is out of place, S. 56, cl. 1, giving a right of appeal to the Board and partly overruling the note. Under Art. 3, where the definition of adoption deed includes an instrument recording an adoption, the cases in I. L. R., 13 B., 280, 281, are quoted without a note of warning that they may not be good law now. There are numerous other blunders which show that the book must have been got up in a great hurry without a careful study of the Act. Compilations which evidence the work of scissors and paste are, no doubt, good in their own way, but we expected better work than a mere collection of cases from Mr. Visvanatha Sastri.

---

Index of Cases reported in *The Indian Law Reports, Madras Series*, 1876—1898, by Dharam Das Suri, printed at The *Caxton Press*, Lahore.

We have already noticed Mr. Dharam Das Suri's Index of the Allahabad Reports. All aids to the profession in hunting up references to decided cases are useful; and in that view we commend this publication.

---

*Guide to Best's Principles of the Law of Evidence*, printed by G. Ramasami Chetty, Madras, Price, Rs. 2-8-0.

We are not in favor of books of this description. Questions and answers are calculated to test a student's knowledge derived from other sources; and where the study of law is very much a study without extraneous assistance, there may be some advantage in the student being able to measure his progress. It is not impossible that there may be some students who can derive some benefit from a *Guide*. The author of the book must have taken some trouble, and we hope it may be rewarded.

The Madras Law Journal.

PART VIII.] AUGUST 1899. [VOL. IX.

## PRIMOGENITURE AMONG MOTHERS.

The question we propose to discuss is whether in the case of competition to succeed to an impartible estate between two females both of whom are entitled to claim as mothers, primogeniture depends upon priority of marriage or upon seniority of age. Under the Mitakshara system of law, at any rate, the position is clear. If the estate be partible, each would be entitled to an equal share as in the case of other co-heirs. Succession by primogeniture is not a part of ordinary Hindu Law, but is engrafted on it by custom which obtains in almost all the ancient Zemindaries in Southern India and has been judicially recognised and affirmed. In the absence of any special usage or custom to regulate primogeniture the criterion on which primogeniture depends is the seniority of age among the co-heirs. If by custom an estate be impartible and descendible to a single heir, that heir ordinarily is the eldest among those, whether males or females who, if the property were partible, would succeed as co-heirs entitled to equal shares (1). Though this may be the general principle, yet it may be said that it has to be modified when applied to the case of succession of the wives to the husband and, therefore, to the case of succession of mothers to the estate of a son. In the former case, the impartible estate of the husband would, no doubt on his death, devolve on his senior wife (2). Seniority among wives will be determined not with reference to their ages but with reference to the priority of their marriages. The relationship from which the right of inheritance springs in the case of a wife dates only from her marriage and not from the date of her birth. In the case of a person marrying several wives at different times, the wife first married acquires the relationship of wife first and the others

(1) *Muttuvaduganadha* v. *Dora Singha*, I. L. R., 3 M., pp. 328 and 329.

(2) Mayne's Hindu Law and Usage, para. 509.

in the order of their marriages, respectively. When there is a competition among wives to succeed to the impartible estate of their husband the right of primogeniture among them depends upon the question which, among them, became first his wife and not on the question, which of them was born first. But this principle is totally inapplicable to the succession of a mother to her son, for the relationship from which alone the right of inheritance springs, begins from the date of the birth of the son and not from the date of her marriage with the father. If, in the case of an adoption by a person having several wives, all the wives have to be considered in law the mothers of such adopted-son, then they all became related to him as mothers at one and the same time and there can, therefore, be no priority among them in respect of their relationship as mothers; and the right of primogeniture should only be regulated by the ordinary rule of seniority in age. It is, therefore, clear that there is no analogy between competition among wives for the estate of their husband and competition among mothers for the estate of their son. The latter is analogous to the case of several wives who were all married at one and the same time in which case if a competition should arise among such wives for their husband's impartible estate, primogeniture will have to be determined with reference to seniority in age. The question is practically decided in favour of the senior in age by the decisions of their Lordships of the Judicial Committee of the Privy Council in the Oorkad case (3), and in the Bangaripoliem case (4). In the Oorkad case the competition was between the sons by the 2nd and 3rd wives of whom the son by the 3rd wife was senior in age to the son by the 2nd wife. The question of law raised for decision was whether primogeniture was to be determined by the priority of birth of the competing sons, or by the priority of marriage of their mothers. If the competition had been among the wives, the husband having died without male issue, the 2nd wife would have succeeded in preference to the 3rd wife, though the latter might have been senior in age. Their Lordships of the Privy Council after an elaborate examination of the various texts of Hindu Law bearing on the question, affirmed the decision of the High Court that primogeniture among sons by

---

(3) *Ramalakshmi* v. *Sivanantha Perumal*, 14 Moore's I. A., p. 570.

(4) *Pedda Ramappa* v. *Bangari Seshamma*, I. L. R., 2 M., 286.

different wives depended not upon the priority of marriage among their mothers but upon the seniority of age among the several sons. The Judicial Committee, however, in that case reserved its opinion as to whether in the case of a competition between the son of a *Pattama stri*, or the first married wife, and the son by a subsequently married wife the right of primogeniture may not be in favour of the son by the 1st married wife, though that son be younger in age to the son of the subsequently married wife. This point was raised and considered in the latter case (Bangaripoliem case) (5) by the Judicial Committee of the Privy Council and it was there held that the ordinary rule of primogeniture among sons, affirmed in the Oorkad case was equally applicable when the competition is between the son by the *Pattama stri* or first married wife and a son by a subsequently married wife. If priority of marriage among mothers is not to be taken into consideration in determining the right of primogeniture among their sons, there is no reason why that should be taken into consideration as regulating primogeniture among the mothers themselves when they compete for the estate of the deceased adopted son. The basis on which the author of the Mitakshara places the mother's right of succession to her son puts the matter beyond all doubt. It is by reason of her propinquity (6) to her son that the author of the Mitakshara places her even before the father in the table of inheritance. This has also been judicially affirmed and acted upon (7). It need hardly be stated that the Mitakshara is of paramount authority in the presidency of Madras. One's step-mother though she is also wife of the father just like his own mother is not recognised as an heir at all in Madras (8). Under the Mitakshara Law as it is administered in Bombay a step-mother as also wives of all other gotraja sapindas are brought in the line of heirs. But in the presidency of Madras, the step-mother and the other female gotraja sapindas are not recognised as heirs (9). On principles of Hindu Law, and especially under the Mitakshara

---

(5) *Pedda Ramappa* v. *Bangari Seshamma, supra.*

(6) Mayne's Hindu Law and Usage, para. 521.

(7) *Balkrishna Bapuji* v. *Lakshman Dinkar*, I. L. R., 14 B., 605.

(8) *Kumaravelu* v. *Virana Goundan*, I. L. R., 5 M., pp. 29 and 32, *Mari* v. *Chinnammal*, I. L. R., 8 M., 107 and *Ramasami* v. *Narasamma*, *Ib.* 8 M., 183.

(9) *Balamma* v. *Pullayya*, I. L. R., 18 M., 168. *Thayammal* v. *Annamalai Mudali*, I. L. R., 19 M., 35.

system of Law, as it is administered in Madras, the mother's right of succession is independent of the father and not by reason of her being the wife of the father. In the case, therefore, of a competition among mothers, the preferential right should not be determined with reference to the priority of their marriages. In the Uttumalai case, Mr. Justice Shephard did not consider this question, but Mr. Justice Best refers briefly to the arguments, *pro* and *con*, (10) and though he does not definitely decide the point, he strongly indicates his opinion that, when the succession is to the son and not to the husband, priority of marriage is not the criterion for determining the right of primogeniture.

In the Uttumalai case, the son's estate was one which devolved on him from his father. Suppose it had been his self-acquisition and not derived from the father, would the rule of primogeniture, as between the mothers, be determined by the priority of marriage. If not, why should the fact that the son inherited the estate from the adoptive father make any difference? Attention may also be invited to the fact, that unlike the English Law, the Hindu Law recognises heritable blood between the mother and her (11) son even though he may not be the offspring of a marriage.

JURISPRUDENCE.

---

## FRIVOLOUS AND VEXATIOUS ACTIONS.

There is no provision in the Code of Civil Procedure enabling a Court of Justice to reject frivolous and vexatious plaints or strike out defences of that character. S. 53 authorizes the rejection of a plaint if it does not disclose a cause of action at or before settlement of issues; and S. 54, Clause *c*, directs the rejection of the plaint if the suit appears from the statement in the plaint to be barred by any positive rule of law. Rule 4 of Order 25 under the Judicature Acts in England provides as follows:—"The Court or a Judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer; and in any such case or in case of the action or defence being shown by the plead-

---

(10) *Annapurni Nachiar* v. *Collector of Tinnevelly*, I. L. R., 18 M., 278.
(11) *Myna Bai* v. *Uttaram*, 2 M. H. C. R., p. 201.

ings to be frivolous or vexatious, the Court or a Judge may order the action to be stayed or dismissed or judgment to be entered accordingly as may be just." It will be observed that the rule relates both to the statement of claim and the answer; and apart from the case of absence of cause of action or reasonable defence it makes special reference to frivolous and vexatious claims and defences. The rule enacted in S. 53 of the Procedure Code that a plaint may be rejected if it does not disclose a cause of action corresponds to the first part of Rule 4. With regard to defences, there is no express provision authorizing the striking out of defences. S. 116 empowers the Court to reject or to direct amendment of, argumentative or prolix written statements or statements containing matter irrelevant to the suit. S. 146 states in the last clause that nothing in the section requires the Court to frame and record issues when the defendant at the first hearing of the suit makes no defence. And S. 152 provides that if at the first hearing of a suit it appears that the parties are not at issue as to any question of law or of fact, the Court may at once pronounce judgment. S. 153 deals with the case of one of several defendants having no defences. These provisions may be regarded as corresponding to that part of rule 4, Order 25, which deals with the absence of a reasonable answer and authorizes judgment to be entered accordingly. There seems however to be no provision in the Indian Code corresponding to that part of the English rule which deals with an action or defence that is frivolous or vexatious and authorizes the Court to stay or dismiss the action or give judgment accordingly. As pointed out already, Cl. *c* of S. 54 directs the rejection of a plaint if from the statement in the plaint it appears that it is barred by any positive rule of law. This provision may fall within the scope of the English rule empowering the staying or dismissal of frivolous or vexatious actions. But the English rule is very much wider. An action being barred upon the face of the plaint by a positive rule of law is only one of the numerous cases in which an action may be frivolous or vexatious. It may not appear on the face of the plaint that it is barred, but it may be apparent the moment the defence is put in. There may also be actions which are frivolous or vexatious which are not barred by any positive rule of law. And there may likewise be frivolous or vexatious defences. It will thus be clear that the English rule

enables courts to render speedy justice by staying actions or entering judgment for the plaintiff where vexatious claims or defences are made—a power which the Courts in this country ought also to possess, but apparently do not, under the provisions of the Code of Civil Procedure. But apart from the Code of Civil Procedure, is there any inherent power in a Court of Justice to stay a vexatious claim or strike out a frivolous or vexatious defence and give judgment. There is abundant authority in England to show that there is such a power; and if apart from powers which are the creatures of statute, there is a power inherent in every Court of Justice to prevent an abuse of its process, the Courts of India must be deemed to possess it.

In *Metropolitan Bank* v. *Pooley*, 10 A.C., 210, a bankrupt whose adjudication at bankruptcy had not been set aside, sought to maintain an action for maliciously procuring the bankruptcy. The House of Lords held that the action was liable to be summarily dismissed upon summons as frivolous and vexatious. The Lord Chancellor *Selborne* observed:—"Before the rules were made under the Judicature Act, the practice had been established to stay a manifestly vexatious suit which was plainly an abuse of the authority of the Court although so far as I know there was not at that time either any statute or rule expressly authorizing the Court to do it. The power seemed to be inherent in the jurisdiction of every court of justice to protect itself from the abuse of its own procedure." After referring to the older practice of objection by demurrer and quoting the language of rule 4, Order 25, his Lordship proceeded:—"In this case the form of the application to the Court was that the action should be dismissed as frivolous and vexatious and not on the ground that the pleading did not disclose a reasonable cause of action. Nevertheless it is an element of primary importance, in determining the question whether the action was frivolous or vexatious, to consider what sort of cause of action, if any, appears on the face of the pleading," p. 215. His Lordship then referred to the adjudication in bankruptcy, the dismissal of the appeal from the adjudication, the application to annul the bankruptcy upon allegation of conspiracy to procure his ruin and the dismissal of that application. His Lordship then referred to the delay in the institution of the present proceeding, and expressed his conclusion that it was frivolous and vexatious. Lord *Blackburn*

followed. He added "But from early times (I rather think, though I have not looked enough to say, from the earliest times) the Court had inherently in its power the right to see that its process was not abused by a proceeding without reasonable grounds so as to be vexatious and harassing—the Court had the right to protect itself against such an abuse; but that was not done upon the demurrer, or upon the record, or upon the verdict of jury or evidence taken in that way, but it was done by the Court informing its conscience upon affidavits, and by a summary order to stay the action which was brought under such circumstances as to be an abuse of the process of the Court; and in a proper case they did stay the action." pp. 220 and 221.

In *Lawrance* v. *Norreys*, 15 A. C., 210, which was an action to recover an estate which had long been in the possession of others alleging concealed fraud which could not have been discovered before, Lord *Herschell* delivering the leading Judgment observed:— "It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the Court. It is a jurisdiction which ought to be very sparingly exercised and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable and one which it was difficult to believe could be proved. * * We have, to begin with, a statement of claim which, if it discloses a concealed fraud within the meaning of the statute, does so in the barest fashion, with much that is most material left vague and undefined, when there ought to have been distinctness and precision. Moreover, this is not the first but the third edition of a statement of claim delivered with the object of recovering the Towneley estate; and when we review the history of the litigation there is much to lead to the belief that important allegations now made were an after-thought, the result of criticism of the earlier form in which the charges of fraud were presented and that the charges thus raised against persons long dead are wholly incapable of proof," p. 219. Upon these grounds the House came to the conclusion that the action was an abuse of the process of the Court.

In *Willis* v. *Earl of Beauchamp*, 11 Probate Division, p. 59, which was an action brought to obtain revocation of letters of

administration granted in 1798, the plantiff claiming to represent the next of kin of the intestate and the defendants being the representative of the deceased administrator, the Court of Appeal held that the action was frivolous and vexatious having regard to the lapse of time, the fact that the defendant could not and would not succeed to the administration sought to the revoked and the other circumstances of the case. The Lords Justices pointed out that Order 25, rule 4, applied only to what appeared on the pleadings and enabled the Court to reject it if on the face of the pleadings the action was frivolous and vexatious. *Bowen* L. J. said "It does not fall under the rule, but the rules, as we have pointed out more than once, do not and that particular rule (Rule 4) does not, deprive the Court in any way of the inherent power which every Court has, to prevent the abuse of legal machinery which would occur, if for no possible benefit the defendants are to be dragged through litigation which must be long and expensive." p. 63. The same view was taken of the power of the Court even before the rule under the Judicature Acts by the Court of Exchequer in *Castro* v. *Murray*, L. R. 10, Exchequer 213.

In *McDougall* v. *Knight*, 25 Q. B. D., p. 1, the Court of Appeal holding that a plea of *res judicata* must succeed, the questions for the jury in the second action for libel being identical with those decided in the first, directed the action to be stayed as frivolous and vexatious.

In *Stephenson* v. *Garnett*, [1898] 1 Q. B., 677, the Court of Appeal held that the question raised in the action was identical with that decided by the County Court Judge upon the interlocutory application and had deen decided by a Court of competent jurisdiction and that the action ought therefore to be stayed as frivolous and vexatious and an abuse the process of Court.

The same principle has been applied with reference to striking out defences and entering judgment for the plaintiff where the plea has been regarded as frivolous or vexatious. In 14 A. C., 665, *Lord Halsbury* said "I think it would be a scandal to the administration of justice if, the same question having been disposed of in the case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again." He proceeded to

add "I believe there is an inherent jurisdiction in every Court of Justice to prevent such an abuse of procedure." p. 668.

In *Remington* v. *Scoles* [1897] 2 Ch. 1, a defendant delivered a statement of defence in which he either denied or refused to admit each of the allegations in the statement of claim, but set up no case of his own. In previous proceedings in another action he had admitted upon oath several of the material statements which he now denied and had not denied any of the others. It was held by the Court of Appeal that though the Court would not upon affidavit evidence order a pleading to be struck out on the ground that the statements in it were false, the circumstances in the case showed the statement of defence to be frivolous and vexatious and one which ought to be struck out as being an abuse of the procedure of the Court. In the Court below Mr. Justice *Romer* observed that evidence may be received in a proper case on a motion of that kind to show that the pleading was an abuse of the process of the Court. After referring to the inherent jurisdiction of the Court to strike out a vexatious defence, Lord Justice *Lopes* said "To induce the Court to exercise this jurisdiction, it is not enough to satisfy the Court that the allegations of fact in the statement of defence or in the statement of claim as the case may be, are improbable or false, for to enter upon the question of their truth or falsehood would be trying the action prematurely. Having regard to the character of this defence, bearing in mind what is known about the case beforehand and what is known about the previous proceedings in the case, this is a sham defence and it has been set up, not honestly and *bonâ fide* as a substantial defence, but for the purpose of delay." p. 7.

In the course of the foregoing pages it must have become apparent that this jurisdiction to deal with vexatious or frivolous claims and defences is inherent in every Court of Justice, and that this power has been invoked to deal with cases which could not fall within the four corners of the English rule. Courts of every country must be deemed to possess this power. In a case from Madagascar *Haggard* v. *Pelicier Freres*, [1892] A. C., p. 61, Lord *Watson* delivering the judgment of the Privy Council where the action was brought against a judge for having dismissed an action summarily as fri-

volous and vexatious expressed himself thus:—"Their Lordships hold it to be settled that a Court of competent jurisdiction has inherent power to prevent abuse of its process, by staying or dismissing without proof actions which it holds to be vexatious." pp. 67, 68. Courts in India appear to us therefore to have the power which is claimed as inherent in every Court although it is not conferred by the Code of Civil Procedure. As regards plaints it is not merely where they do not disclose a cause of action or the claim upon the face of the plaint is barred by any positive rule of law, but even where otherwise they are shown to be frivolous and vexatious as in the case of concealed fraud, (*Lawrance* v. *Norreys*, 15 A. C., 211), or in the case of a perfectly stale claim, the Courts in India have the power which is certainly to be sparingly and cautiously exercised but exercised firmly and unhesitatingly where the circumstances require it, of summarily dismissing the action; and the same power is possessed by them of striking out a frivolous or vexatious defence and entering judgment for the plaintiff. There are no cases in the Indian Reports to show that such a power has ever been exercised. It was once exercised in a recent litigation relating to the Shivaganga Zamindary by a Subordinate Judge; but although the case went up to the High Court on appeal, it was unnecessary for the Appellate Court to pronounce any opinion upon this novel and *salutary* departure from the practice of the Courts.

The anxiety to suppress vexatious actions as speedily as possible and to save the defendant from being harassed by them has been so keenly felt by the British Legislature that a special statute has been enacted the provisions of which might well be reproduced Ch. 51 of 59 and 60 Vict., S. 1, enacts as follows:—

"It shall be lawful for the Attorney-General to apply to the High Court for an order under this Act, and if he satisfies the High Court that any person has habitually and persistently instituted vexatious legal proceedings without any reasonable ground for instituting such proceedings, whether in the High Court or in any inferior Court, and whether against the same person or against different persons, the Court may, after hearing such person or giving him an opportunity of being heard, after assigning counsel in case such person is unable on account of poverty to retain counsel, order that no legal proceedings shall be instituted by that person

Majesty's Government—an act on the part of the plaintiff which was a crime within the meaning of S. 11, Foreign Enlistment Act, 1870—and brought this action for damages for various injuries and losses which resulted in the course of that expedition, it was held by the Court of the Queen's Bench (*Grantham* and *Kennedy*, JJ.) that a person induced by false representations of another, to do an act which was really a crime but which by reason of such representation the plaintiff thought, was neither illegal nor immoral, could bring an action for damages resulting from the act.

---

*Landlord and Tenant—Breach of Covenant—Mistake—Forgetfulness—Equitable relief against forfeiture.*

**Eastern Telegraph Company, Limited, v. Dent and Others.** [1899] 1 Q. B., 835 C. A.

In this case it was held by the Court of Appeal (*A. L. Smith*, *Collins* and *Romer*, L. JJ.) in confirmation of the Judgment of *Kennedy* J. that where the lessees without the permission of the lessors which they were bound to take under the terms of the lease-deed sublet the premises, the lessors were entitled to recover possession as on a breach of covenant and that neither his forgetfulness nor his *bonâ fide* belief that it was unimportant could entitle him to any equitable relief against forfeiture.

---

*Practice—Adding defendants—Different causes of action—Suit for damages.*

**Thompson v. The London County Council** [1899] 1 Q. B., 840 C. A.

In this case the plaintiff claimed damages from the London County Council for the injury caused to his house by the negligent excavation of the land adjoining his house. On a plea by the defendants that the loss was caused by a Water Company in not completely shutting up their water-main, he applied to make the New River Company defendants in the suit. *Bigham*, J. ordered the joinder of the Company in reversal of the order made by the Master. The Court of Appeal consisting of *A. L. Smith*, *Collins* and *Romer*, L. JJ. in its turn reversed the order of the Judge and held that the cause of action against the two defendants were separate though the resulting damage was the same and that the New River Company could not be joined as defendants in the suit.

*Master and Servant—Neglect of duty—Forgetfulness—Dismissal without Notice.*

**Baster v. London and County Printing Works** [1899] 1 Q. B., 901.

Where a workman in charge of a printing machine caused damage to it to the extent of thirty pounds by his forgetfulness to fix what was known as the toprider before starting the machine and having been dismissed without notice brought this suit for the recovery of two weeks' wages, it was held by the Court (*Darling* and *Channel*, JJ.) upon a case stated by a Metropolitan Magistrate that even a single case of forgetfulness in respect to an important thing might be so grave as to justify dismissal without notice and that having regard to the facts found by the Magistrate, it could not be said that the Magistrate was wrong in dismissing the plaintiff's claim.

---

*Bankruptcy—Administration Order—Executrix paying money in her hands to Official Receiver without retaining debt—Mistake—Claim to be repaid.*

*In re* **Rhoades—Ex parte Rhoades** [1899] 1 Q. B., 905.

In this case the question was whether when an executrix had handed over money in her hands belonging to the testator to the Official Receiver on an order for administration in bankruptcy of his estate and had claimed to prove in bankruptcy for a debt owing to her by the deceased, the executrix could subsequently withdraw the proof of her debt and claim to be paid in full in consideration of her right of retainer in ignorance of which she handed over the whole collections to the Official Receiver. It was held by *Wright* J. that the order for administration did not affect the right of the executrix to retain her debt, that the mere fact of the payment into the hands of the Official Receiver would not put an end to the right of retainer any more than payment into Court or payment to a receiver or payment to a trustee, that though the executrix sought to prove her debt in bankruptcy, she had withdrawn and could withdraw the proof before any adjudication was made upon it and that she was consequently entitled to claim payment of her debt in full.

---

*Negligence—Liability of Charterer for defective Condition of Ship.*

**Marney v. Scott** [1899] 1 Q. B., 986.

The question that arose in this case was whether when the plaintiff at the request of a stevedore engaged by the defendant went on board a ship chartered by him and in the course of loading the ship fell from a defective ladder and was injured, he could claim damages from the

defendant who was the charterer of the ship. The defendant contended that there was no contract between the plaintiff and himself, that having taken care to ascertain from the owners that the ship was fit for service he was not liable to the plaintiff even in tort and that under the terms of the charterparty the owner being bound to repair and keep the ship fit for service, it was the owner who was liable for negligence and not the defendant. *Bigham* J. held that the ship having been placed at the disposal of the defendant, he was the occupier of the ship within the meaning of the decided cases and that having regard to the fact that the ship had just returned from a coasting voyage, and the other circumstances of the case the defendant was in duty bound to devote some attention to the ladder and other appliances which would be used by the stevedore and his labourers in the act of loading. The defendant was therefore held liable in damages to the plaintiff.

---

*Limitation—Tenancy at will—Mortgage by the landlord—Determination of the tenancy—Fresh tenancy*—3 and 4 *Will. IV.*; *Ch.* 27, *Ss.* 2 *and* 7.

**Jarman v. Hale** [1899], 1 Q. B., 994.

In 1882 the plaintiff became the owner of the house now in the occupation of the defendants. The defendants were let into possession in 1883; but no lease or other deed passed between the plaintiff and the defendants and no rent was paid. The plaintiff mortgaged the house in 1893 and it is in evidence that the defendants knew of this mortgage next year. There was also evidence that the defendants subsequently admitted orally and otherwise that the plaintiff was the owner and they were his tenants at will. The County Court Judge held under these circumstances that the original tenancy at will determined on the execution of the legal mortgage and notice of it to the defendants, but that since the plaintiff had parted with the reversion no fresh tenancy at will could be found as between the plaintiff and the defendant, and that the suit was barred by limitation. On appeal the Court of the Queen's Bench (*Darling* and *Channel*, JJ.) held that the County Judge was right in deciding that the tenancy terminated on mortgage and notice to defendants, but that he was wrong in supposing that no fresh tenancy could be created between the mortgagor and the tenant because the mortgagee would not be bound by the tenancy so created and that if a fresh tenancy was proved limitation would run only from the date of such tenancy. They therefore remanded the case for a finding as to whether a fresh tenancy was in fact created between the parties to the suit.

*Workmen's Compensation Act—Acting in emergency—Accident "arising out of or in the course of the employment"—Compensation.*

**Rees v. Thomas** [1899] 1 Q. B., 1015 C. A.

Where a workman whose duty it was to make a report of the state of the mine at an office half-a-mile from the place, got into a fully laden tram-cart of the miner and on the horse bolting got down in order to stop the horse and in so doing fell and was killed, a question was raised as to whether having regard to the facts that the workman rode on full trucks contrary to the rule of the mine and that the workman had no duty to perform in respect of the horse, the workman could be said to have suffered injury in the course of the employment and whether his wife was entitled to any compensation.

The county Court Judge held that the workman's getting into the tram was not such serious and wilful misconduct within the meaning of the Act as to disentitle the plaintiff to compensation, and that the deceased having acted in the interest of his master in an emergency which suddenly arose, the accident should be held to have arisen out of or in the course of his employment and that the plaintiff was entitled to compensation.

On Appeal by the miners the Court of Appeal (*A. L. Smith, Collins* and *Romer*, L.J.) affirmed this Judgment. *Lowe* v. *Pearson* (1899) 1 Q. B., 261, distinguished.

---

*Mortgage of reversion—Interest—Foreclosure—Redemption—Limitation—Waste by Life-tenant—Damages—Barred debt—Retainer.*

**Dingle** *v.* **Coppen and Coppen** *v.* **Dingle** [1899] 1 Ch. 726.

A testator devised certain properties to his wife for life and after her death to the defendant in fee. The defendant mortgaged his reversionary interest to the life-tenant. After her death, her executors brought this action to foreclose the mortgage. The defendant submitted to a decree for foreclosure but claimed damages for waste committed by the life-tenant. This claim was objected to on the ground that by submission to the foreclosure decree the defendant had lost all right to the lands and could not claim damages in respect of waste. On the other hand, it was contended for the defendant that the decree was only an order *nisi* and that the equity to redeem which the defendant still possessed gave him sufficient interest to maintain the counterclaim. *Byrne*, J. was of opinion that without offering to redeem the defendant could not main-

tain the claim but gave leave to amend. Thereupon the defendant amended by offering to redeem on payment of the mortgage amount and six years' interest minus any sum that might be assessed as damages. The claim for damages was based upon the fact that though under the terms of the will it was the duty of the tenant "to keep the premises in good tenantable repair and condition," she had allowed the cottages to fall into disrepair and the marsh lands to be mown more than once during the course of the year and to be depreciated. On this amendment, three new contentions were raised for the plaintiffs.

1. Though in a decree for foreclosure only six years' interest could be claimed, where the defendant insisted upon his equity to redeem, he ought to do equity to the mortgagee by paying all arrears of interest not merely those due in respect of the six years before the action.

2. The plaintiff was entitled to retain the damages in satisfaction of certain advances made to the defendant by the deceased which were admittedly barred by the statute.

3. And the defendant was not entitled to damages for the depreciation of the marsh lands, as the course of dealing by the tenant was the same as and entirely dictated by, that of the testator.

As to the first contention, *Byrne* J. held that though in some cases, the opinion had been expressed that there was no difference between a case of foreclosure and one of redemption in respect of the amount of money to be recovered, the more correct view was that expressed by *Kindersley V. C.* in *Edmund* v. *Waugh* and by *Kay* J. in *In re Marshfield* and that where the mortgagor having lost his *legal right* comes into court insisting on his *equity* to redeem he could not be allowed to excuse his own default in paying the full arrears of interest by setting up the mortgagee's neglect to enforce payment of it.

On the second contention, he held that there was no such claim of retainer recognised by the law, that if such a claim were admissible at all, it was admissible as set-off either legal or equitable and that the party having rightly admitted that this was no case for set-off, the claim to retain damages for a statute-barred debt was not sustainable. *Courtenay* v. *Williams*, 3 Hare 539 and *Jeffs* v. *Wood*, 2 P. Wms., 128 discussed and distinguished.

On the last point *Byrne* J. pronounced for the executors, being of opinion that the tenant for life was not bound to take more care than the testator himself and that having guided herself entirely by the practice of the testator she was not liable in damages to the reversioner.

---

*Mortgage—Equity of Redemption, fetter on—Notice to pay off principal.*

**Stanley v. Wilde** [1899] 1 Ch. 747.

The sub-lessee of a theatre who had an option to purchase the lease from the lessee on payment of £2,000 within a particular time arranged with a stranger for a loan of £2,000. It was agreed between the sub-lessee and his lender that as soon as the lease right was acquired it should be mortgaged to him and a legal mortgage of it executed providing for, among other things, the payment of the loan with interest at 6 per cent. and a third of the net profits of the theatre and for the payment of the money in twenty quarterly instalments of £100. The mortgage was to secure not only the repayment of the £2,000 with interest but also to secure the payment of all other moneys payable by the covenant, so that the mortgage was not redeemable on payment of the principal with interest but must continue to subsist to the very end of the lease in order to secure the payment of the proportion of the profits. Some of the instalments were in arrear and the mortgagee gave notice requiring the payment within three months of the whole amount with interest. He was asked to withdraw the notice but refused to do so. Subsequently on payment of the instalments in arrear, the mortgagee offered to withdraw his notice but now the mortgagor insisted upon paying him the amount due. The money was tendered but the creditor refused to accept the money. The mortgagor now brought this suit to redeem on payment of the amount tendered. It was contended for the defendant that the transaction was in substance a scheme for sharing profits and not really a case of mortgage, that even if it was a mortgage and the covenant to pay profits was an illegal restraint imposed upon the equity of redemption, the covenant was invalid only so far as it affected redemption and was valid as a mere money claim and that the defendant should be allowed to withdraw his notice.

*Byrne*, J. decided that the case was substantially one of mortgage, that the agreement to secure the payment of one-third of the profit rental by the mortgage (See [1898] 2 Ch. 307, 322) was according to the rule laid down in *Biggs* v. *Hoddinott* an illegal restraint upon the equity of redemption, that there was no authority to show that a provision restraining the right to redeem was enforceable except so far as it clogged redemption and that on the analogy of the cases of notice to quit, it must be held that the mortgagee could not after once insisting upon being paid, go back upon it without the consent of the mortgagor.

*Will—Gift—to attesting witness—Codicil unattested—second codicil attested—Legacy, validity of.*

*In re* **Trotter—Trotter v. Trotter** [1899] 1 Ch. 764.

In this case the question was whether when a legatee under the terms of a will and two codicils, had attested the will and the second codicil, he could take the legacy as directed by the will. It was established by the case of *Anderson* v. *Anderson*, L. R. 13 Eq. 381 that though a will was attested by the legatee, the repetition of the gift in a codicil amounted to a republication of the will and that since the legatee was not an attesting witness to the codicil, he could take the legacy. In this case there was the additional fact that subsequent to the date of the unattested codicil on which the legatee could rely according to *Anderson* v. *Anderson*, there was another codicil republishing the will and the codicil with certain modifications which the legatee had attested. The question was whether this made any difference. It was held by *Byrne*, J. that it made no difference, that the true test was whether there was any one instrument to which the legatee could point out as conferring a valid legacy upon him and that since there was in this case, one instrument, namely, the first codicil when makes a valid gift, the legacy could be recovered.

---

*Minor—Apprenticeship—Benefit of the Minor.*

**Green v. Thomson** [1899] 2 Q. B., p. 1.

The question in this case was whether an apprenticeship deed by which it was provided that the apprentice should serve for a term of five years excepting the usual holidays and days on which the business of the master might be at a standstill through any accident *beyond his control* and the master should pay wages and instruct the apprentice excepting on such days, was valid or whether it was void as not being for the benefit of the minor. It was held by the Court of the Queen's Bench (*Darling* and *Channell*, J.J.) to which it was referred by the Justices of the County of Derby that the true rule was that stated by *A. L. Smith*, L.J. in *Corn* v. *Matthews* [1893] 1 Q. B., 310 at p. 316, to the effect that if the provisions of the will were so manifestly to the disadvantage of the minor as to make it unfair that he should be bound by it, the deed should not be enforced, that as laid down by the above case if the Master had the right reserved by the deed to dispense with the infant's services at his will and pleasure it would be injurious to the interests of the minor to enforce such a contract but that a provision that the minor should neither work nor receive wages for the days

during which business had to be stopped through an accident *beyond* the master's control was not so unreasonable nor so disadvantageous to the infant as to be incapable of enforcement.

Reports of Bankruptcy and Company Cases, Vol. VI., Parts 1 and 2, (*in Exchange*).

## JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks receipt of the following publications:—

Sind Sadar Court Reports, Vol. 1., No. 2. (*in exchange.*)
The Bombay Law Reporter for August (*in exchange*).
The Albany Law Journal for August (*in exchange*).
The Calcutta Weekly Notes for August (*in exchange*).
The Allahabad Weekly Notes for August (*in exchange*).
The Green Bag for August (*in exchange*).
The Canadian Law Times for August (*in exchange*).
The Canada Law Journal for August (*in exchange*).

*The last Criminal Sessions* of the High Court added another case to the long list of European offenders who having caused the loss of a native life have escaped the penalty of the law. It was admitted for the prisoner that his pistol went off and caused the death of the man who was standing in front of him. The plea was accident. It is unnecessary for us to recapitulate the history of the case; and we do not care to enquire whether or not there was an attempt to commit rape on the unfortunate girl. But the fact remains that the deceased man interceded and he was shot dead. The law presumes that under the circumstances the death was caused intentionally. The plea of accident was for the prisoner to establish. The jury consisting mostly of Europeans, after the prosecution evidence was over and the Doctor examined for the prisoner proved the girl was still a virgin, without waiting to hear the prisoner's evidence as regards the plea of accident, if he had any, or the Judge's charge which would have pointed out that it was for the prisoner to establish his plea, stopped the further trial by a unanimous verdict of "not guilty." There is no doubt that the jury were quite wrong in thus interrupting the trial even assuming that they would be justified in an ultimate verdict of acquittal.

There is no provision of law for the jury to terminate a trial before all the stages are gone through; and a very essential part of the Sessions trial is the charge of the Judge to the jury. No doubt the jury have to decide in the last resort the issue of murder or death by

accident and that they are to do only after the Judge has summed up the case. Supposing the Judge pointed out in his summing up cogent reasons for a conviction calculated to make an impression upon the mind of any jury, how can it be said that a verdict given before such a charge was heard was proper. It seems to us also that the learned Judge who presided at the trial was not right in accepting the verdict. He should have told the jury to wait until the charge was delivered. If the learned Judge was himself of opinion that the prisoner was innocent and that his summing up would only explain the reasons for that conclusion it might be thought that that labour was supererogation. Even in that view, it appears to us that the procedure laid down by the Code should have been conformed to. But in the absence of any material evidence of accident, the Judge himself would have been bound to point out that the burden which lay upon the prisoner had not been discharged.

Whether there was a miscarriage of justice in this case or not, we have no doubt that there has been a material error of procedure. We feel very little doubt that if the Crown Prosecutor placed the case before the Advocate-General, the latter officer would feel compelled to state a case to the full Court for its opinion. The conviction of prisoner O'Hara was set aside by the Full Bench of the Calcutta High Court upon a case stated by the Advocate-General of Bengal. We do not see why the acquittal of Gunner Love should not be set aside by the Full Bench of the Madras High Court upon a case stated by the Madras Advocate-General.

***

*The Sixty years' rule for Indian High Court Judges*:—We think the rule laid down by the Secretary of State that Judges of Indian High Courts should be compulsorily retired at sixty is objectionable from several points of view. We have been very much amused to be told that the Secretary of State is negotiating with each man before appointment for a promise on his part, in writing we suppose, to retire at the appointed time. We wonder whether there is nobody to tell the Secretary of State that Indian Judges hold office during Her Majesty's pleasure and that it is competent to him to signify that pleasure when a High Court Judge passes his sixtieth year. There is no necessity for a contract to enforce the sixty years' rule under the law as it stands.

The question is whether the rule itself is wise. It is a matter of every day occurrence that men are appointed judges in England at such ripe ages as sixty and sixty-five; and they hold the judicial office till they are even past four score years. Englishmen appointed judges in

India do not seem to be more short-lived than their brethren in England. It ought always to be possible for the Secretary of State without any hard and fast rules to retire a judge when his powers have begun to fail. Most English Judges in India retire of their own accord before they are sixty or they have earned their full pension as Judges of the High Court. We have rarely known an instance of any English Judge in India who continued to hold office after his mental or physical energies have begun to fail; nor has there been any instance of a native of India of that description. The only instance of physical debility was that of Sri Romesh Chunder Mitter who retired in consequence at the early age of 50 or 51. We cannot, therefore, see any justification for the rule in the past history of judicial careers in India.

The office of judge is one to which the holder of it should bring the wisdom of age and experience; and ripe years are, therefore, a most important qualification for the office. Once the rule is made that a judge should be retired at sixty, it follows that appointment should be made at such an age as would enable the holder of the office to stay in it sufficiently long to entitle him to the pension of a High Court Judge. As the full period of pensionable service is eleven and a half-years and there will always be two or three years of furlough when there is no active service a person should be appointed judge ordinarily before he is forty-five. It is not always possible to find men below forty-five who by their qualifications and standing at the bar are likely to prove acquisitions to the Bench. Take the case of the seats that are filled by natives. If this rule had been in force, it would have been impossible for such excellent appointments as those of Mr. Justice *Subrahmanya Aiyar* and Mr. Justice *Ranade* to be made. The rule will render the appointment of eminent Indians at the bar to the High Court Bench impossible; and nobody will deny that this is a result much to be deplored.

Again, it is not every person that is appointed to the office of judge that cares to serve long enough to earn a pension. To make an assumption that every person appointed to the office should be able to qualify himself for full pension and appoint, therefore, only those who are below forty-five overlooking the claims of abler seniors is to lower the prestige of the judicial office and to reduce the occupants in the estimation of the public. We trust that this new experiment will not be long continued to the detriment of the administration of justice in the country.

***

*Working of the United States Supreme Court.*

United States Supreme Court Justice Hon. David Brewer, in an article in the Kansas City Lawyer, gives a most interesting insight into the workings of the Supreme Court, from which we quote the following:—

"Let me give an insight into the way business is transacted in this Court. Five days, as I have said, are given each week to the hearing of arguments, the court convening promptly at 12 and adjourning as promptly at 4, and these hours are fully occupied by arguments of counsel. Everything is placed before us in print, records and briefs, each justice having a copy. On Saturday we meet for consultation, and the cases argued during the week are brought up for discussion. Each justice is expected to have made full examination of each record and the questions involved before that time, and if any one has not done so the consideration is postponed one week or until all are ready. As to the vigor and earnestness of these discussions I can only say that I have never known anything to equal them. Ofttimes cases are continued from Saturday to Saturday for further discussion and consideration. When discussion is at an end the roll is called and a vote taken. Each justice is entitled to a book in which is entered on each page, under a blank space for writing the title of a case, the names of all the justices, by means of which he may, if he desires, keep the vote of every justice in every case. I can by turning back to the books which I possess ascertain the vote of every justice in every case that has been considered and determined since I have been on the bench. It often happens that differences of opinion which are indicated by the vote do not appear in the result as announced from the bench, for they who in fact dissent do not consider that question of sufficient importance to publicly record such dissent. Saturday night the chief justice, to whom is assigned the duty of distributing the cases among the justices, sends around a slip showing what cases he has assigned to each justice for the writing of the opinion of the court. This duty of assigning cases is a most delicate one, and could, if unwisely discharged, provoke no little irritation. To the great credit of the present Chief Justice be it said that no one could be more fair and wise than he in such distribution. Up to the time of receiving this slip no one knows what cases he will be called upon to prepare the opinion in. Thereafter, at such time as he has at his command, outside of the hours of session, he writes the opinion. When written it is sent to the printer; nine copies are stricken off, one given to each of the justices, by whom it is examined, criticised and returned with the criticism to the writer. After this it is again brought up in

conference; the suggestions and criticisms are considered and approved, or rejected. These criticisms run both to the matter of argument and style, things omitted and things inserted, and ofttimes the corrections are so far-reaching that the opinion as finally announced bears little resemblance to the one originally prepared. When upon this action the opinion has been placed in such form as is acceptable to the majority, it is ready to be announced on the succeeding Monday morning."—*The Albany Law Journal.*

***

*Condition of Courts in England*:—The condition of the Courts goes from bad to worse. Only, four Judges were sitting in the Queen's Bench Division yesterday, and not a single jury case was in the list. Mr. Justice Darling and Mr. Justice Phillimore formed a Divisional Court, Mr. Justice Mathew sat in the Commercial Court, and Mr. Justice Wright was engaged with the Railway and Canal Commissioners.

The absence of Lord Justice Rigby from the Court of Appeal—due to illness more serious, we regret to learn, than the newspaper reports have indicated—has made it necessary for Lord Justice Smith to announce that probably no further final appeals will be taken in Appeal Court II this side of the Long Vacation, unless the parties agree to have them heard by two Judges. It will be interesting to observe whether the parties to appeals will thus be pressed into consenting to have them tried by two members of the Court. The continued growth of arrears in the Court of Appeal makes it necessary that some change in its constitution should be made without delay. If it is undesirable that the Law Lords should be added to the *ex-officio* members of the tribunal, why cannot retired Judges be made competent to sit with the Lords Justices whenever there is pressing need for their assistance. Sir Edward Fry has recently been sitting with the Judicial Committee of the Privy Council. His services would have been far more useful in the Court of which he was once a member.—*The London Law Journal.*

***

*Contempt of Court*:—Lord Watson, in giving judgment in the *St. Vincent* contempt of Court case, made a noteworthy statement as to the position of Judges who are attacked in this country. 'Committals for contempt of Court by scandalising the Court itself have,' he said, 'become obsolete in England!' Our Judges are not slow to resent any attempt to interfere with the administration of justice by means of public comments on pending cases, but they are prudent enough to leave to public opinion any attacks

made upon themselves. An occupant of the Bench who is assailed in a newspaper on account of the manner in which he discharges his judicial duties has the ordinary right of a citizen to bring an action for libel against his assailant, but his power to punish him summarily for contempt of Court has, according to Lord Watson, become obsolete. This statement is certain to survive the interest that attaches to the particular proceedings in which it was made. Lord Watson was careful to remark that the power that has become obsolete in England may be useful in a Colony with a population of a low order of intelligence; but it is evident that the Acting Chief Justice of St. Vincent, in seeking to uphold the dignity of his Court, did much himself to impair it. He sent to prison for fourteen days a member of the Bar who presented to a local library a copy of a newspaper which contained a vigorous attack upon the manner in which the Acting Chief Justice discharged his duties. Mr. McLeod, who was ignorant of the contents of the newspaper when he handed it to the librarian, appealed to Judicial Committee of the Privy Council, which has allowed his appeal with costs. It is to be hoped that his successful protest against a remarkable piece of judicial tyranny will prevent other Judges from holding an exaggerated notion of their own dignity.

* * *

The chief contribution of West Indian Judges to the Law of England appears to be a series of leading cases on contempt of court. We do not know whether this arises from the aggressiveness of the Colonial Bar, the American freedom of the Colonial Journalist, or the learned leisure of the Bench, which permits it to treat seriously mere trifles. In M'Dermott's case, L. R., 1 P. C., 260; L. R., 2 P. C., 341, the publisher of a paper in British Guiana was sentenced to six months' imprisonment for comments on the administration of justice in the Colony. An appeal to the Judicial Committee was dismissed on the ground that the Court below was a Court of Record, and has a discretionary power to commit which was not the subject of appeal. This opinion seems not now to prevail, or rather committal for contempt is treated a criminal matter, and special leave is given in exercise of the prerogative in criminal cases; but this appears to be done only where the original order is bad in form or substance (see *In re Wallace*, 36, Law J. Rep., P. C. 9; L. R., 1 P. C., 283, and *In re Pollard* L. R., 1 P. C., 106). In a reference from the Bahama Islands (*In re Moseley*, 62 Law J. Rep., P. C. 79; L. R. (1893) App. Cas. 138) it was established that contempt of court is criminal, and can be pardoned by the Governor of

the Colony. The then Chief Justice of the Colony had by his counsel argued to the contrary. The latest precedent is perhaps the strangest. An article was published in a Grenada newspaper reflecting on the judicial conduct of the Acting Chief Justice of St. Vincent. A barrister in St. Vincent, correspondent of the paper but not the writer of the article, lent the public librarian of Grenada a copy of the paper, not having read its contents. For this act he was committed by the Acting Chief Justice for contempt. On appeal the Judicial Committee have held that no contempt in fact was committed, as the appellant did not intend to publish the matter complained of and was under no duty to make himself acquainted with the contents of the paper before he handed it over:—*The London Law Journal.*

***

The following is taken from an article on "*The Ethics of Advocacy*" that appeared in the latest number of the Law Quarterly Review.

Every advocate is bound by an unwritten but stringent bond of ethical obligation to take no undue advantage of his tribunal. Some advocates have stronger individualities, and, fortunately or unfortunately, are sometimes better lawyers than some judges before whom they appear. But there are no circumstances in which a counsel is justified in deliberately misrepresenting the law, either in matters of principle, precedent, or practice to a judge who has a weak personality, or who is more ignorant than he ought to be, or who is new to his work, or who is unfamiliar with a particular branch of legal knowledge in which the advocate happens to be an expert. It goes without saying that he must not cite, or rely upon as existent, a statute which has been repealed; nor inform the Court that a statute cited by his opponent has been repealed when he knows that it has been subsequently enacted; nor quote as an authority a decision which he knows has been expressly overruled. The caustic and cynical snub blandly administered to an adventurous advocate of this kind.—I believe by Lord Westbury—'Avoid fallacious reasoning: you are sure sooner or later to be found out. Moreover, never mistake the *law*; the facts are always at your disposal,' is not without its significance. Nothing can ever justify the distortion of known facts; but to misrepresent the law may have as evil consequences as to pervert the facts. Legal and commercial business alike are conducted on the footing that legal principles and rules established by legislative or judicial authority, or by time-honored custom, will be respected by the administrators and practitioners of the law. *Stare decisis* is a rule the indiscriminate departure from which would entail the most serious consequences. Conveyances are framed, wills made, titles quieted, and business generally transacted on the strength of established decisions. Courts, therefore,

are not to be misled nor inveighed into wrong judgments by the misplaced ingenuity of advocates in order to gain victories for their clients in particular cases. If such forensic practices were to obtain generally, truth would be dishonoured and justice dethroned just as much as by the evil arts of suppression, distortion, mutilation and invention, which are universally regarded as indefensible in dealing with matters of fact.

***

*Tardy delivery of Judgments* :—The striking instances of the tardy delivery of reserved judgments have occurred within the past few days. The case of *The Lord Advocate* v. *Wemyss and others*, in which the posthumous judgment of Lord Herschell was read, was argued in the House of Lords on December 15, 1898. More than seven months, therefore elapsed between the hearing of the appeal and the delivery of the judgment. The Judicial Committee of the Privy Council gave judgment on Tuesday in the case of *Cox and Another* v. *Sprigg* in which the arguments were concluded on December 7:—*The London Law Journal.*

***

*Posthumous Judgments* :—A posthumous judgment, though it cannot be counted in the event of a division of opinion among the Law Lords, is not a novelty in the House of Lords; Lord Herschell is not the only judge of whom it may be said, 'He being dead yet speaketh.' Shortly after the death of Lord Campbell in 1861, a judgment he had written was read by Lord Brougham. A more modern precedent is not wanting. The late Lord Justice Chitty sat last January in the Court of Appeal with Lord Halsbury and Lord Justice Smith, and heard an appeal in which judgment was reserved. He died before the decision of the Court was delivered, but his written judgment was read by Lord Justice Smith, and, with the consent of Counsel, was made part of the decision of the Court the technical difficulty, that arose in the Court of Appeal being overcome by giving the order of the Court the date on which the appeal was heard :—*The London Law Journal.*

***

*Agency—Insurance Policies—Waiver of condition* :—An Insurance Agent accepted overdue premiums from the insured in several instances. *Held*, that forfeiture for non-payment of a premium when due may be thus waived although the policy expressly states that no waiver shall be valid unless in writing signed by an officer of the Company. *James* v. *Mutual Life Association*, 49 S. W. Rep., 978 (Mo).

A contrary result has been reached in the case of an express waiver by an agent, on the ground that knowledge by the insured of the terms of his policy is to be presumed and that therefore the principal cannot

be *held* since the agent has clearly exceeded his authority. *Smith* v. *Nigara Insurance Company*, 60 Vt. 682; *Quinlan* v. *Providence Washington Insurance Company*, 133, N. Y., 356. The decisions in accord with the principal case do not question this well settled doctrine of agency, but either decide that such a restriction in a policy is inoperative because inconsistent with the rule of law that there may be a waiver by parol, or find an estoppel arising independently of the agent's authority. *Dwelling House Insurance Company* v. *Dowdell*, 55 Ill. App. 622; 1 Joyce Ins., S. 43. The exact ground of the decision in the principal case is not clear but it may well be supported on the second reason suggested. The insurer must have known of the overdue payment of the previous premiums, and, having made no objection should be estopped from insisting on the forfeiture:—*Harvard Law Review.*

***

*Contracts—Consideration—Forbearance.—Held* that a forbearance to sue upon a groundless claim is a sufficient consideration to support the promise of a third party to pay the amount claimed. *Di Iorio* v. *Di Biazio*, 42 Atl. Rep. 1114 (R. I.)

The Court here adopts a doctrine which was first laid down with respect to cases of this kind in *Callisher* v. *Bischoff Sheim*, L. R., 59 B., 449. There is no intimation in the opinion of the Court that to constitute a sufficient consideration to support a promise the thing done by the promisee must be a legal detriment to him. The case is, therefore, directly in line with the position taken in 12 Harvard Law Review 515, that in the present state of the authorities consideration should be defined to be "any act or forbearance by one person given in exchange for the promise of another." See 12 Harvard Law Review, p. 276.—*Harvard Law Review.*

***

*Property—Percolating Waters—Right to withdraw*:—The city built extensive wells which drew off the water percolating through the plaintiff's land, thus rendering it unfit for crops. *Held* that the defendant was liable for the damage done. *Porbell* v. *City of New York*, 56 N. Y. Supp. 790 (Sup. Ct. Sp. Term).

This decision is contra to *Chasemore* v. *Richards*, 7 H. L. Cas. 349, but follows the only American case in which the exact point has been adjudicated. *Smith* v. *City of Brooklyn*, 46 N. Y. Supp. 141. The Court lays down the general doctrine that the right to percolating water comprises only the right to use it in the owner's land. But by the weight of authority the right to such water is absolute. *Acton* v. *Blundell*, 12 M. and W., 324; *Chatfield* v. *Wilson*, 28 Vt. 49. And moreover, while the principal case asserts that it is the subject of correlative rights it rejects the only logical conclusion, namely, that the reasonableness of the user is

the measure of those rights. *Bassett* v. *Salisbury Manufacturing Company*, 43 N. H., 569. The actual result, however, accords with the view taken by the New Hampshire Court, and in a jurisdiction where the question is still open that view might well be followed. The ends of practical justice and convenience can only be reached by restricting to reasonable limits, the right to use percolating water, nor does such restriction seem inconsistent with the land-owner's natural rights.

***

*An Injunction against Visiting a Woman.*—An injunction against visiting another man's wife or writing to her or in any way communicating with her was recently sustained by the Texas Court of criminal appeals. The decision was made in a *habeas corpus* proceeding for release from imprisonment for contempt of court by disobeying the injunction. The prisoner boldly attacked the injunction as an infringement upon his constitutional right to freedom of speech and the pursuit of happiness, but the court did not so consider it. The chief contention was that a purely personal right could not be protected by equity; but the court, quoting at some length from the note in 37 L. R. A., 783, held that such contention is not supported either by reason or by the actual practice of equity courts. While the general rules of equity were deemed sufficient to support the injunction, the court called attention to Tex. Rev. Stat. art. 2989, authorizing an injunction whenever relief to which a person is entitled "requires the restraining of some act prejudicial to the applicant." In this case the plaintiff sued for damages on account of a partial alienation of his wife's affections, and sought an injunction to prevent a further alienation.

But the rights of the woman in the case remain to be considered. She is not mere property of her husband which he can have sequestered or put into the hands of a receiver. She is herself a person with rights and "troubles of her own." Whatever may be the husband's remedies as against third persons, has he any right to hedge up her freedom? The English case of *Reg.* v. *Jackson* (1891) 1 Q. B., 671, denied the right of a husband to confine his wife in his own house in order to give him an opportunity to regain her affections and prevent her from coming under the influence of her relatives who might alienate her from him. But a wife's freedom of action is in some degree limited by injunctions to keep other people from communicating with her. Precedents showing that the courts may award injunctions against courting a ward of court do not apply to a married woman of full age. If, at her husband's suit, another man may be restrained from visiting her, then it would seem that at her suit her husband might be restrained from visiting another woman, and that woman restrained from receiving his visits. We should go toward government by injunction at a rapid rate if courts could

interfere with the liberty of persons of full age and sound mind by regulating their social relations and restraining them from having communication with each other in order to keep them from improper influences.—*Case and Comment.*

***

*Parent and Child.*—An illegitimate child of an unmarried man and a married woman is held, in *Ives* v. *McNicoll* (Ohio) 43 L. R. A. 772, to be legitimated by their subsequent marriage after the mother's divorce from the husband, by virtue of a statutory provision for legitimation by marriage of parents. The fact that the mother was married at the time of the birth of the child is held immaterial.—*Case and Comment.*

***

*His wit saved him.*—Detroit used to have a lawyer who was shrewd enough to show contempt of court without incurring danger of the penalty that would have been visited upon an offender less diplomatic. He was at one time being heard in an important matter before the Supreme Court, and made an assertion which elicited from one of the judges: "That is not the law, sir."

"Pardon me, your honor," with a deferential bow, "it was the law until a minute ago. Now we accept a new principle established by a supreme authority."

On another occasion he was reading from an imposing looking book in support of a position that he had taken upon a legal question.

"Just a moment," interrupted the supreme justice himself; "do you mean to say that you are reading good law?"

"Not at all, your honor; only Supreme Court decisions."

The most cutting thing he ever said to this same court was during the consideration of a desperate case in which he had not a leg to stand upon. He made a bold contention which was fallacious but plausible from beginning to end.

"Blank," said the court severely, "I would not try to convert the average justice of the peace with such an argument as that."

"Nor I," was the quick response, "but I had what I considered reliable information that none of the honorable members of this honorable court had ever served in that capacity."

"You have practised before me for years, Blank," said a circuit judge at one time, "and this is the first time you have shown contempt."

"Yes, your honor," answered Blank, "I have wonderful self-control!"
—Exchange.—*The Albany Law Journal.*

***

*Two Types of Judicial Opinion.*—Two eminent Massachusetts jurists, now on the bench, illustrate in their written opinions two widely contrasted forms of judicial utterance, says the New York Law Journal. The opinions of Mr. Justice Gray, of the Supreme Court of the United

States, are very voluminous. The reader may safely rely upon his having cited every authority of importance bearing upon a case in which he writes. Moreover, the previous decisions are not shoveled in indiscriminately with the cheap affectation of erudition characteristic of ambitious but dull judges. The current of authority is systematically marked out, and the cases of great significance are conscientiously analyzed and their precise bearing and weight indicated. Finally, there is displayed original reasoning power of a high order, which enables the author not only to classify and assimilate, but also to evolve practical conclusions, which always command respect and usually concurrence of conviction. Mr. Justice Gray's opinions are scientific, legal essays, taking the case at bar as a timely text, and in the end deciding it. These compositions undoubtedly belong to what may be called the old school of judicial composition. They hark back to earlier American times, when the volume of litigation was small, but judges had all the time there was, and when the distinguishing of inapplicable English precedents and the creation of an American jurisprudence, founded upon, but not identical with, the English common law, were important judicial functions. The greatest quality of John Marshall's genius was his instinctive perception of what should be taken and what should be modified or left.

The opinions of Mr. Justice Holmes, of the Supreme Judicial Court of Massachusetts, unlike those of Mr. Justice Gray, are cast upon the English judicial model. He takes it for granted that his readers know or will look up the general law of the subject down to date, and considers only such cases as may directly affect the point at issue. To show with what acuteness he discriminates and selects would be entirely superfluous. Though on the great question of the proper attitude and policy of American courts toward so-called "Labour" controversies we radically disagree with him, we heartily admire his judicial strength and usual sanity of view, being the joint product of well-digested earning and thoughtful common sense.

As to the respective types of judicial opinion, the one for which Mr. Justice Holmes stands is to be recommended as a general model. In such a tribunal as the Supreme Court of the United States, which, for the Federal Courts and for many classes of litigation arising in State courts, exercises final appellate jurisdiction, an exhaustive historical and analytical essay is sometimes legitimate and valuable. Occasionally also in supreme State tribunals such a production may be desirable. But, for the ordinary run of cases, it behoves a judge to begin where his predecessors left off and go on from that point. Only by following this method can the appalling increase of volume of the reports be kept down. Too many long opinions are merely padded for pedantic display, or represent the result of the judge's study of principles that are really trite, but happened to be unfamiliar to him.—*The Albany Law Journal.*

# NOTES OF AMERICAN CASES.

A drawee bank which pays the good-faith holder of a forged check on which an indorsement is forged is held, in *First National Bank* v. *Marshalltown State Bank* (Iowa) 44 L. R. A., 131, to have no right to recover back the money paid.

***

A very striking application of the rule that a bank is not liable for negligence of a notary employed by it is made in *First National Bank* v. *German Bank* (Iowa) 44 L. R. A., 133, where a bank is held not to be liable for the negligence of its assistant cashier, who was a notary public in failing to give proper notice of the dishonor of an inland draft which the bank held for collection.

***

Members of a trade association who combine to induce or compel other persons not to deal or enter into contracts with one who will not join the association or conform his prices to those fixed by the association are held, in *Doremus* v. *Hennessy* (Ill.) 43 L. R. A., 797, to be liable for the injuries caused to him by loss of business resulting from such combination.

***

The withdrawal of patronage from a person by members of an association by concerted action is held, in *Boutwell* v. *Merr* (Vt.) 43 L. R. A., 803, to be illegal when their concert of action is due to the coercion of a by-law imposing a fine or penalty upon any member who violates it, and the fact that they voluntarily assumed the obligations of their association is held not to relieve the by-law from its coercive effect.

***

Publication pending trial of an action, of an article concerning the cause, which is calculated to prejudice the jury and prevent a fair trial, is held, in *Telegram Newspaper Co.* v. *Com.* (Mass) 44 L. R. A., 159, to constitute a contempt for which a corporation may be criminally liable.

***

An unusual case as to what constitutes a sitting of a judge in a cause is that of *State, ex rel. Hezel* v. *Bland* (Mo.) 43 L. R. A., 845, where it is held that a judge sat in the cause so as to be entitled to dissent from the decision and cause the case to be certified to another court on the ground of a conflict of decisions, although he had had no consultation with the other judges on the merits of the case but was on the bench when it was argued and submitted, and agreed to the withholding of the decision for a time, and, when that was rendered in his absence, sent to the judge who wrote the opinion a memorandum stating that it conflicted with another decision and that a motion for rehearing ought to be granted, and also filed a dissenting opinion, while he was also on the bench

but not consulted when motion was overruled by associates in accordance with a previous understanding between them, of which they had notified him.

***

Jurisdiction to inquire into and control the internal management of a foreign corporation is denied in *Condon* v. *Mutual Reserve Fund L. Asso.* (Md.) 44 L. R. A., 149, in which an injunction against an assessment upon a member by a foreign corporation was refused.

Proof of a signature by mark is held, in *Wienecke* v. *Arbin* (Md.) 44 L. R. A., 142, to be insufficiently made nearly twenty-five years afterwards by testimony of an attesting witness that he certainly saw the signature made or he would not have put his name there, when he is unable to recall the circumstances or the place of the alleged signing,—especially when there is no proof that the maker of the instrument made or authorized its delivery, or that it was read or explained to the maker, who could not read.

***

An ordinance prohibiting hackmen and draymen from stopping their vehicles on certain streets except when actually engaged in receiving or delivering passengers or goods is held, in *Ex parte Battis* (Tex.) 43 L. R. A., 863, to be in excess of charter authority to prevent the encumbering of streets.

***

A claim of duress as ground for annulling a marriage was rejected in *Collins* v. *Ryan* (La.) 43 L. R. A., 814, where the proof was that a reluctant and passive consent to the performance of the marriage ceremony was yielded by the husband under pressure brought to bear upon him because it was his duty, under the circumstances, to marry the girl. The other authorities on duress to avoid marriage are collated in the annotation to this case.

***

A policy of insurance on a steam fire engine, hose pipe, and hose cart while located and contained in a fire engine house, "and not elsewhere," is held, in *L'Anse* v. *Fire Association* (Mich.) 43 L. R. A., 838, to be insufficient to cover the property while being used in attempting to extinguish a fire several hundred feet from the engine house.

Insurance of a kind not known at the time of the passage of a statute exempting insurance on the kinds of business for which corporations may be formed, such as that of guaranteeing the fidelity of officers and the performance of contracts, is held, in *People ex rel. Kasson* v. *Rose* (Ill.) 44 L. R. A., 124, to be within the provisions of that statute.

***

An ordinance requiring a license for the business of contracting for public work is held, in *Figg* v. *Thompson* (Ky.) 44 L. R. A., 135, to be

unconstitutional, because it tends to create a monopoly and increase the burden of property owners, where the statutes require assessments for the cost of improvements to be made upon abutting owners.

***

An ordinance requiring a license fee to be paid as a condition of buying claims is held, in *Bitzer* v. *Thompson* (Ky.) 44 L. R. A., 141, to be unconstitutional in case of a person who buys, merely as an investment, a few claims admitted to be just and due but which are not paid because of lack of funds.

***

The pardoning power of a governor is held, in *Sharp* v. *State ex rel. Cason* (Tenn.) 43 L. R. A., 788, to extend to cases of contempt.

***

An illegitimate child of an unmarried man and a married woman is held, in *Ives* v. *McNicoll* (Ohio) 43 L. R. A., 772, to be legitimated by their subsequent marriage after the mother's divorce from the husband, by virtue of a statutory provision for legitimation by marriage of parents. The fact that the mother was married at the time of the birth of the child is held immaterial.

***

A pledgee's purchase of the pledged property at his own sale is held, in *Glidden* v. *Mechanics' Nat. Bank* (Ohio) 43 L. R. A., 737, to leave the pledge still in force, unless the pledgor elects to treat the transaction as a valid sale, in which event he can hold the pledgee accountable for the net proceeds, but cannot hold him liable for conversion so long as the pledgee has possession of the property and can restore it on payment of the debt for which it is pledged. The annotation to this case presents the prior decisions on the conversion of pledged property by the pledgee's invalid sale.

***

Notwithstanding the rule that a geographical name cannot be a trademark, it is held, in *American Waltham Watch Co.* v. *United States Watch Co.* (Mass.) 43 L. R. A., 826, that the original manufacturer of Waltham watches may have an injunction against the use of the word "Waltham" by another manufacturer of watches at the same place, unless distinguishing words are used to prevent deception of the public.

***

A statute authorizing associations or unions of working men to adopt labels or devices to distinguish the products of their labor, is held constitutional in *Perkins* v. *Heert* (N. Y.) 43 L. R. A., 858.

# The Madras Law Journal.

PART IX.] SEPTEMBER 1899. [VOL. IX.

## THE DREYFUS CASE.

The Dreyfus affair has at last come to a close. During the five years that have elapsed since the arrest of Alfred Dreyfus in October 1894, the name of no man has so constantly and so prominently found a place in the newspapers. From the very commencement the proceedings in his case have engaged the attention, at times even wearisome, of the whole civilized world. People in all countries have watched his fate with anxious sympathy. The excitement reached its fever-height during the recent trial at Rennes and enormous sums of money were expended by the leading newspapers to provide the public with a daily report of the proceedings. When the verdict of the Court Martial against Dreyfus was announced, the thrill of indignation which ran through the world was unique in its intensity and in its breadth. Seldom has there been a more sublime spectacle than this, of a world in anger at the outrage which had been perpetrated against justice. The quickness with which public opinion was focussed and the quickness of the explosion of feeling which followed are triumphs of the modern facilities of communication. The tension of public feeling has now been reduced by the pardon, however ungracious, granted by President Loubet. It is a strange circumstance that while the excitement outside France was one of sympathy for Dreyfus, the excitement in France was one of unmitigated antipathy to Dreyfus. Now, what is the reason of the importance attached to this case from the very beginning and of the opposite feelings it has evoked within and without France? Briefly stated, the charge against Captain Dreyfus was that he sold important military secrets to Germany. The charge, if duly proved, would certainly have justified the punishment of Dreyfus. But it was not proved in any manner which would satisfy an unbiassed or dispassionate tribunal, and French public opinion was wrought to a state of frenzy which

incapacitated it for forming a calm judgment. Dreyfus has the misfortune to belong to the Jewish race and hatred of his race combined with hatred of Germany and adoration of the army inflamed the minds of the French people against him. To the public outside France, the interest of the case lies in the evidence it affords of corruption in the General Staff of the army, of the callous indifference to justice and humanity bred by the military spirit and of the unfairness of the French criminal procedure to persons accused of crimes. We are, however, more concerned with the legal aspects of the case, the light which it throws upon the French law of criminal procedure and evidence. To enable our readers to form an idea of their procedure, we shall give a very brief account of the case.

Alfred Dreyfus began his career in the army in 1882 as a Lieutenant in an artillery regiment. In 1893 he was appointed probationer on the General Staff or governing body of the French army and was in the latter part of 1894, when the scene opens, a member of that staff. At this time Colonel Sandherr was at the head of the Intelligence Department of the General Staff and Colonel Henry was his assistant. The Intelligence Department had bribed the charwomen at the foreign embassies to pick up and bring to them scraps of letters and documents which had been torn up and thrown into the waste paper basket. In September, 1894, the charwomen at the German embassy handed over to the Intelligence Department the fragments of a letter or *bordereau* which had been received by Colonel Schwarzkoppen, the German military attaché and torn up by him. This *bordereau* offered information in regard to important military secrets and stated that the writer was setting off to the manœuvres. The military secrets of France had for a considerable time been in the possession of Germany and the Intelligence Department was naturally anxious to discover the author of the *bordereau*. Besides the handwriting of the document there were clues furnished by the contents of the document. The writer was probably an officer of artillery and a member of the General Staff and must have attended the manœuvres of 1894. Dreyfus was an officer of artillery and was a member of the General Staff. But he did not attend the manœuvres of 1894 and on the date of the *bordereau* he knew that he

was not to attend. The handwriting of the *bordereau* was pronounced to be different from that of Dreyfus by M. Du Gobert the expert for the Bank of France. But suspicion fell on Dreyfus, because he was a Jew and because he had been known to be of an inquisitive turn of mind. Once suspicion fell upon the unfortunate man, the department went to work in the full belief that he was really guilty and would not admit the possibility of any mistake. In the investigation which followed, there was a disposition in the department, to introduce every matter which might possibly prejudice them against Dreyfus, and to shut out every matter which might prove his innocence or shake their suspicions. This disinclination was an exaggerated form of the tendency of detective officers all over the world never to admit that they have been on the wrong track. But there was a special circumstance in this case, to account for the endeavours made, to fasten the guilt upon Dreyfus. There were two persons who were immediately interested in directing the enquiry into a wrong channel and of whom one had full access to the records of the Intelligence Department. These persons were Colonel Henry already mentioned. and his friend and accomplice Major Esterhazy. Colonel Henry had been in the habit of selling information to the German embassy and his medium in these nefarious transactions was Esterhazy. The *bordereau* in respect of which Dreyfus was suspected had, as a matter of fact, been written by Esterhazy. And his authorship has been subsequently admitted by himself. Colonel Henry was therefore interested in averting suspicion from his accomplice and himself and in fastening it upon Dreyfus. The actual date of the *bordereau* was altogether incompatible with the hypothesis of Dreyfus's guilt, as he had known in May that he was not to attend the manœuvres. The date of the *bordereau* was therefore altered to a date in April. M. Du Gobert having pronounced against the identity of the handwriting, another expert was found in the person of M. Bertillon to swear to the identity. Our readers are aware of the dangers of expert testimony and of the caution with which English judges act upon such testimony. No more signal illustration of the danger of such testimony can be given than this evidence of the handwriting of Dreyfus. Upon the flimsy materials we have mentioned Dreyfus was arrested on the 15th October, 1894, on a charge of treason and thrown into prison, the jailor being under strict instructions

to deny to Dreyfus the use of all writing materials and to prevent him from seeing or communicating with anybody including the members of his family.

No particulars of the charge were vouchsafed to him, and he was in complete ignorance as to the cause of his arrest and imprisonment. During his detention in jail he was visited by Commandant Du Paty de Clam, and was subjected to frequent inquisitorial examinations, with the object of entrapping him into some admission of guilt. These examinations, however, proved fruitless, as the prisoner would not and could not, confess a crime he had not committed. The jailor informed General Mercier the Minister of War that in his opinion based upon the observation of the prisoner's conduct, he was not the real culprit and that the department had gone off on a false track. Dreyfus was eventually allowed an interview with his counsel, Maitre Demange, and he was ordered to be tried by a Court-Martial consisting of seven officers, on the 19th December, 1894. Three weeks before the date of the trial General Mercier wrote to the Figaro that the guilt of Dreyfus was absolutely certain and that he had the most positive proofs of his treason. The spectacle of responsible officers of the Government writing to the newspapers upon a case which is *subjudice* and trying to prejudice the minds of the public against the accused is unintelligible and cannot conceivably happen, in any country where the English law is administered. At the instance of the prosecution the trial took place within closed doors. The *acte de'accusation* alleged that Dreyfus used to work after hours, that it was conceivable, that he might have gained access to the bureaux with improper motives, that his statement to Du Paty de Clam that he might search everywhere, and his surrender of the keys, were clear proof that all compromising documents had been hidden or destroyed, that he persistently denied his guilt and easily got out of the charge owing to the supple character of his mind and that his handwriting was identical with that of the *bordereau*. Of the experts in handwriting two deposed against him and three declared the identity to be uncertain. The only other important witnesses were Du Paty de Clam who gave a history of the prisoner's life and Colonel Henry. The judges, however, were not free from doubt and when they retired for con-

sultation at the close of the case, a secret *dossier* was sent to the President by General Mercier through Du Paty de Clam with instructions to the judges to read it at the close of the case and return it. The secret *dossier* consisted of four documents which have all since been found to be forgeries. These documents were not proved. They were not shown to the accused or his counsel and he had no opportunity of meeting them. One of these documents was destroyed by General Mercier as soon as it was returned to him and a copy of it which was discovered in 1897 was immediately burnt. It was this secret *dossier* that removed all doubt from the minds of the judges and they found Dreyfus guilty of treason and condemned him and sentenced him to degradation and confinement in Devil's Island. Another attempt was made to obtain a confession from Dreyfus, and he was asked by Du Paty de Clam whether he had not merely given up documents of no importance for the purpose of obtaining more valuable ones in exchange. Dreyfus, however, denied the charge altogether. On the day of his public degradation Dreyfus informed Captain Le Brun-Renaud of his conversation with Du Paty de Clam. Captain Le Brun-Renaud, however, forgot a portion of Dreyfus's statement and reported that Dreyfus had said that if he communicated information to Germany, it was with the object of securing more valuable information in exchange. No steps were taken by General Mercier to verify the so-called confession.

In July 1895 Colonel Picquart succeeded Colonel Sandherr as Chief of the Intelligence department. In March, 1896, Colonel Picquart received the fragments of a *petit bleu* or telegram-card from the charwoman of the German embassy. When the pieces were put together it was found to be a confidential communication addressed to M. Esterhazy. In his enquiries about Esterhazy, Colonel Picquart obtained specimens of Esterhazy's handwriting and found it to be identical with that of the *bordereau*, an opinion in which he was fully confirmed by M. Bertillon. Colonel Picquart pressed his superior officer General Gonse to order the arrest of Esterhazy, but the latter refused on the ground that he could not think of going back upon the trial of Dreyfus, that the reputation of the highest Generals was involved in it, and that the confinement of Dreyfus even if unjust was not a matter to weigh against it in the balance. In September, 1896, the fact that Dreyfus had been

convicted upon secret evidence illegally communicated at the close of the case was published to the world in the columns of the *Eclair*. In November, 1896, the *Matin* published a facsimile of the *bordereau* alleged to have been written by Dreyfus. In November, 1896, an interpellation was made as to the possibility of a revision, but General Billot, the Minister of War, declared that the matter was, a *chose-jugee* or, to use the language of our Courts, a *res judicata*, that it was not possible to go back upon the trial and that justice had been done. Colonel Picquart having been found to own a somewhat troublesome conscience, he was sent to Tunis and Colonel Henry was appointed in his place. Colonel Henry actively began the manufacture of a number of letters and telegrams with the help of one Le Mercier Picard with the object of ruining Picquart, saving Esterhazy, and producing fresh proofs against Dreyfus. On becoming aware of the attempts made to ruin him, Colonel Picquart came to Paris and entrusted his lawyer M. Leblois with copies of the correspondence, between him and General Gonse regarding the authorship of the *bordereau*: M. Leblois succeeded in persuading M. Scheurer-Kestner the Vice-President of the Senate of the innocence of Dreyfus: M. Scheurer-Kestner applied to the Premier M. Meline, and to the Minister of War General Billot for a revision of the trial, but in vain.

From that time forward M. Scheurer-Kestner devoted himself to the task of establishing the innocence of Dreyfus and it is one of the most pathetic incidents of this painful story that he died without witnessing the fruition of his labours for the release of Dreyfus. In October, 1897, Esterhazy's stock-broker M. de Castro discovered the identity of the writing of the *bordereau* with the handwriting of his client Esterhazy and communicated his discovery to M. Scheurer-Kestner. On the 15th November, 1897, Dreyfus's brother wrote to the papers accusing Esterhazy of the authorship of the *bordereau* and challenging the Minister of War to prosecute Esterhazy. Esterhazy and Du Paty de Clam, now forged a number of letters with the object of concocting charges against Colonel Picquart and the theory set up by them was, that Dreyfus and Colonel Picquart had made themselves acquainted with Esterhazy's style of handwriting that Dreyfus had in writing the *bordereau* simulated the handwriting of Esterhazy

and that Colonel Picquart had forged the *petit bleu.* A judicial enquiry was held into the conduct of Esterhazy and ended in his acquittal. Colonel Picquart, on the other hand, was found guilty of having communicated General Gonse's letters to his lawyer and dismissed from the army. The scandal of Esterhazy's acquittal and Dreyfus's conviction stirred the indignation of M. Zola who published a scathing attack upon the War Office in the columns of the '*Aurore*' charging the first Court-Martial with punishing a man whom they knew to be innocent and the Second Court-Martial with acquitting to the order of the Government a man who was really guilty. The position of M. Zola compelled the Government to take notice of this attack and to order his prosecution for libel, but though M. Zola had denounced in no sparing terms the infamy of the Dreyfus's trial behind closed doors and with secret testimony, and though M. Zola and his Counsel urged the Court that the whole article should be made the subject of prosecution, it was confined to the single passage in which he charged the Esterhazy Court-Martial with having acquitted to order. The Zola trial is an excellent illustration of the peculiarities of French Criminal Procedure. The opening speech of the Counsel for the prosecution was immediately followed by the opening speech for the defence. The Counsel for the accused is allowed the privilege of having the last word after the prosecutor's reply. Questions are not put to the witnesses directly, but are addressed to the judge and he is asked to put the question to the witness. Witnesses were allowed to speak, not merely to facts within their knowledge but to matters of hearsay and to express opinions and make speeches to the jurors. Witnesses are not examined consecutively for the prosecution or for the defence, but without any order and very often while the examination of a witness is going on, a number of other witnesses are examined to contradict the unfinished testimony of the witness already under examination. The evidence of the witnesses and the speeches of Counsel are punctuated with hisses and cheers, and the remarks of approval or disapproval of the audience. During the examination of General Mercier he volunteered the statement "I say upon my word as a soldier that Dreyfus was a traitor who was legally and justly condemned." He was also allowed to make a long speech to the jury in support of the conviction of Dreyfus. Another witness General De Pellieux said in reference to the

Esterhazy Court-Martial "It was made up of seven brave officers who had shed their blood on the fields of battle while others (looking at Zola) were—I know not where." General Pellieux produced a despatch forged by Le Mercier Picard at the instance of Colonel Henry but purporting to proceed from Colonel Panizzardi, the Italian Military attaché and stating that he was resolved to deny his relations with Dreyfus. The Court refused to allow Zola's Counsel to cross-examine upon this document. General De Pellieux appealed to the jury to save their sons in the army from the butchery which would follow, if the prestige of the Generals was impaired. General De Boisdeffre threatened the retirement of the chiefs of the army, if Zola was acquitted.

On behalf of Zola several distinguished men of letters were produced who declared their belief in the *bona fides* of Zola in his letter to President Faure. The speeches of Counsel on both sides travelled beyond the record and referred to matters about which there was no evidence in the case. Zola's Counsel was allowed in his speech to read long extracts from the newspapers in favour of Dreyfus and his family. Though the presiding judge had ruled that the prosecution had nothing to do with the Dreyfus conviction, the witnesses for the prosecution and Counsel on both sides were permitted to refer to the trial in their speeches. The jury returned a verdict of guilty and after the procedure we have detailed, it would have been surprising, if they had returned a different verdict. Zola was sentenced to one year's imprisonment and a fine of 3,000 francs but on appeal to the Court of Cassation the verdict was quashed on a technical ground and a re-trial was ordered. M. Zola allowed judgment to go by default, and left for England and the Zola episode thus came to an end.

In July 1898 M. Cavaignac, the Minister of War, produced before the Chamber of Deputies the forged despatch written by Picard and stated that Dreyfus had confessed his guilt. Colonel Picquart wrote to the papers denouncing the despatch as a forgery and the German and Italian Governments informed the Minister of War that the despatch was a forgery by Picard under the orders of Colonel Henry. Colonel Henry was then interrogated by the Minister of War and finally confessed that he had committed the forgery under orders for the good of the army and that what we

had done he would do again for the good of the country and of the army. Colonel Henry was then arrested and put in prison, but he was found dead the next morning with his throat cut. Esterhazy left for England with Du Paty de Clam and confessed his authorship of the *bordereau.* A change of ministry followed and M. Brisson the new Prime Minister sent up the case to the Court of Cassation which came to the conclusion that the *bordereau* was written by Esterhazy and that this fact rendered a re-trial of Dreyfus necessary. Dreyfus was accordingly brought from Devil's Island and the re-trial commenced on the 6th of August last before a Court-Martial of seven officers at Rennes. Several ex-Ministers of War and several Generals came forward as witnesses for the prosecution and deposed to their belief in the guilt of Dreyfus. The evidence adduced in the case consisted of the opinions of experts in handwriting, expressions of belief on the part of the witnesses as to the guilt of Dreyfus and many other matters of hearsay which will not be received in any English Court of Justice. Evidence was also adduced to show that Dreyfus had led a loose life before his marriage and it was sought to be inferred therefrom that he was likely to have committed the offence charged against him. On the principles which guided the Court, it would have been possible to convict most persons of any conceivable offence. Letters sent to Court by persons who did not appear before the Court as witnesses were used as evidence without any attempt to call the writers or prove the contents. We have already referred to the peculiar method of cross-examination in French tribunals in which counsel are not allowed to put the question direct to the witness, but are obliged to put it through the Court. The verdict of the Court pronounced by a majority of five against two was as extraordinary as the procedure adopted. Dreyfus was pronounced guilty but under extenuating circumstances. If Dreyfus was guilty at all, there could be no palliation of the offence. The Court of Cassation having found that the *bordereau* was written by Esterhazy and not by Captain Dreyfus, it is difficult to conceive how any Court should have honestly come to the conclusion that Dreyfus sold to the German Government the Military secrets mentioned in the *bordereau.* The pardon granted by President *Loubet* can hardly be deemed to be an act of justice to Dreyfus. Though he has obtained his personal freedom, the stigma of a conviction still remains. He

was entitled to an acquittal and ought to have been acquitted. It is strange that a civilized country like France should possess a criminal procedure so ill adapted to the ascertainment of truth and the ends of justice. Miscarriages of justice and high-handed acts of oppression are no doubt likely to occur in all countries; and in India, we have recently had a flagrant instance of such an abuse of power in the case of the Natu brothers. While in some respects the case of the Natu brothers is far worse, and far more pitiable than that of Dreyfus, for while Dreyfus has had the satisfaction of at least knowing the charge against him and of having had a public trial, however ill-conducted, the Natu brothers have been kept in confinement without even the semblance of a trial and without any intimation to them of what they were accused of. While Englishmen have expressed their indignation at the iniquity of the treatment accorded to Dreyfus, they have been altogether oblivious of the fact that similar or even worse treatment has been accorded in India to the Natu brothers. It must be said, however, to the credit of the English Government that though it may commit people to confinement under antiquated Regulations for so-called political reasons, such cases are rare and that in all criminal *trials* the procedure adopted is far more favourable to the prisoner and far better calculated to serve the ends of truth and justice. If there is one thing for which we have to be grateful to the English Government more than for any other, it is for the administration of the English rules of evidence and the English rules of Procedure in our Courts.

## SUCCESSION TO IMPARTIBLE ESTATE.

## SENIORITY AND HALF BLOOD.

It was decided by the High Court of Madras that in the case of an impartible Zemindary the brother of the half blood is by reason of seniority of age entitled to the succession in preference to the brother of the full blood but junior in age, vide *Ramasami Kamaya Naik* v. *Sundara Lingasami Kamaya Naik*, I. L. R., 17 M., 422. The family consisting of three brothers was governed by the law of Mitakshara, and its status was that of an undivided and not that of a divided Hindu family and the impartible Zemindary was not the self-acquired or the separate property of the deceased. If

the family was a Bengal family governed by the Dayabhaga Law, there can be no doubt that though the family was an undivided one, the brother of the full blood, (vide *Rajkishore Lahoory* v. *Gobind Chunder,* I. L. R., 1 C., p. 27) would exclude the brother of the half blood, though the latter be senior in age to the former and it is equally clear that if the family were a divided one or the property was the self-acquired or the separate property of the deceased, even under the Mitakshara Law, the brother of the full blood as being nearer of kin would exclude the brother of the half blood, though the latter be senior in age. In the above three cases, the succession is governed by the law of inheritance of which the cardinal text under the Dayabhaga School is the text of Manu, *viz.,* " to the nearest sapinda the inheritance next belongs" and under the Mitakshara School is the text of Yajnavalkya founded upon the above text of Manu, *viz.,* "The wife and the daughter also, both parents, brothers likewise and their sons, gentiles, cognates, a pupil and a fellow-student; on failure of the first among them the next in order is indeed heir to the estate of one who departed for heaven leaving no male issue." (Mitakshara, chapter II, Section I, Placitum 2, Stokes' Hindu Law Books, page 427).

The author of the Dayabhaga applies the text of inheritance both to a divided and an undivided family. If a member of an undivided family dies without male issue, his undivided share descends in the same way as it would if he were divided and the share separated and allotted to him.

The author of the Mitakshara, however, holds that Yajnavalkya's general text of inheritance above quoted governs only the succession to the estate of a separated Hindu and not to the undivided interest or share of a deceased member of an undivided family without male issue.

In the latter case according to his doctrine, there is no descent or inheritance so called, but his undivided share or interest in the joint family property simply lapses to the surviving members of the family.

Under the Mitakshara Law in the case of the property of a divided member or separate or self-acquired property belonging to

an undivided member, succession is by inheritance; and in the case of the undivided share of a deceased member of a joint family, succession to such share is by survivorship. In the former case, the nearer excludes the more remote while in the latter the undivided interest of the deceased devolves on all the surviving members irrespective of the nearness or remoteness, in the degree of propinquity of each of the surviving members, to the deceased.

In the *Saptur* case, *vide* I. L. R., 17 M., 422, if the Zemindary had been a partible one, on the death of the father of the parties, the Zemindary would have devolved jointly upon the two sons by one wife, and the son by another wife—and if after the father's death, a partition had been effected among the three brothers, each taking one-third share, and a contest arose after the death of one of the sons of the joint wife as to the succession to the one-third share of the deceased brother, then there could be no doubt that the deceased's full brother would exclude the half brother.

If no such division had been effected among the three brothers, the undivided share of the deceased brother would, on his death, devolve jointly on the full brother, and his half brother, and if a partition subsequently takes place between the survivors each will take an equal moiety in the whole Zemindary. It will thus be seen that a full brother and a half brother *equally* participate in the undivided share or interest of the deceased brother whereas if the deceased had been divided, his separated share would have devolved only on his full brother to the entire exclusion of his half brother. These are the principles of law which will undoubtedly be applicable to the case if the Zemindary were a partible one.

But as the Zemindary was an impartible one descendible to a single heir, the question was what was the rule applicable to the case reported in determination of such heir. This question is succinctly answered by their Lordships of the Privy Council in *Jogendro Bhupati* v. *Nityanand Man Sing,* I. L. R., 18 C., p. 151, as follows :—

"For determining who is to be heir to an impartible estate, the same rules apply which also govern the succession to partible estate, though the estate can be held by only one member of the family at a time."

In that case which was governed by the law of the Mitakshara, a Hindu father, the owner of an impartible estate died leaving him surviving a legitimate son and an illegitimate son—the former succeeded to the Zemindary and died without male issue but leaving three widows and a daughter. The illegitimate brother who was not divided from the deceased claimed the Zemindary by right of survivorship and their Lordships of the Privy Council affirmed his claim in preference to those of the widows and daughter on the ground that if the property had been partible he would have succeeded to the whole by right of survivorship to the exclusion of the widows and daughters of the deceased.

In *Ranee Sartaj Kuari* v. *Ranee Deoraj Kuari,* I. L. R., 10 A. 272, and 15 I. A., 51, it was laid down that though junior members of an undivided family have no coparcenary or joint rights with the Raja or Zemindar holding an impartible estate, yet for the purpose of determining who was entitled to succeed to the estate on his death the estate must be considered as the joint property of the family. Applying to the *Saptur* case this principle which was acted upon in I. L. R., 18 C., p. 151, it follows that the decision of the High Court was correct.

If the estate were partible the brother of the full blood and the brother of the half blood would be entitled to an equal moiety of the estate and of the undivided interest or share of the deceased brother; and the fact that one was of the full blood would give him no advantage or priority over the other who was only of the half blood. In other words, both of them will be *equally* entitled if the estate were partible.

But as by reason of the custom of impartibility only one of the two can succeed, priority is determined by primogeniture or seniority of age. The family being admittedly an undivided one it follows that the senior in age is entitled to succeed in preference to the junior, both being on a par if the estate had been a partible one.

It was, however, held in the *Tipperah* case. (*Vide Neelkisto Deb Barmono* v. *Beerchunder Thakoor,* 12 Moore's I. A., p. 523) that a brother of the full blood though junior in age was entitled to succeed to an impartible estate in preference to a brother of the half blood who was senior in age. The ground of

decision is expressly stated to be that succession by survivorship is incompatible with the custom of impartibility and consequent sole ownership and that, therefore, the law of succession would be the same as that which would be applicable to the separate estate. This decision of the Privy Council is no doubt sound and applicable to cases governed by the Dayabhaga Law, vide *Rajkishore Lahoory* v. *Gobind Chunder*, I. L. R., 1 C., 27 and *Sheo Soondary* v. *Pirthee Singh*, L. R., 4 I. A., p. 147. But if it be held applicable to cases governed by the Mitakshara School it is at direct variance with the prior and subsequent decisions of the same tribunal and its logical result will be that a widow or the daughter of a deceased Zemindar should take in preference to his undivided brother or cousin.

The *Tipperah* case appears to be really governed by the Dayabhaga Law (*vide Beerchunder Joobraj* v. *Neelkissen Thakoor*, Vol. I., Sutherland's Weekly Reporter, p. 177), and if so the decision is strictly in accordance with that law as expounded in *Rajkishore Lahoory* v. *Gobind Chunder Lahoory*, I. L. R., I C., 27. Though at the time when the Tipperah case was decided, there probably was an erroneous notion at Calcutta that even under the Dayabhaga Law, there was survivorship as an exception to the general scheme of inheritance in the case contemplated by Jimuta Vahana in verse 34, section V., chapter 11 of the Dayabhaga.

In the very next volume of Moore's Indian Appeals, *viz.*, 13th volume, p. 333, their Lordships in an appeal from the Presidency of Madras emphatically overruled the argument which was advanced by the counsel for the appellant therein that the estate in question being impartible must from its very nature be taken to be separate estate, the succession to which was determinable by the law which regulates the succession to a separate estate whether the family be divided or undivided (*vide* p. 336, 337) and held that the mere impartibility of the estate is not sufficient to make the succession to it follow the course of succession to a separate estate (*vide* page 339).

The same principle was recognized and acted upon in *Chowdhry Chintamun Singh* v. *Mussamut Nowlukho Konwari*, L. R., 2 I. A., 263, and several other cases, the latest being the one already

referred to, *viz.*, I. L. R., 13 C., 151. All these cases were admittedly governed by the law of the Mitakshara and the decisions therein are directly at variance with the Tipperah case if the latter were regarded as applicable to a case governed by the Mitakshara School. As already observed the Tipperah case is really a Dayabhaga case though some of the observations in the judgment would seem applicable in principle to every impartible estate whether governed by the Dayabhaga Law or the Mitakshara Law. On the assumption, apparently an erroneous one, that the Tipperah case was applicable to cases governed by the Mitakshara School, the High Courts of Calcutta, Madras, and Allahabad were compelled having regard to the various decisions of the Judicial Committee of the Privy Council to express their dissent from the decision of the same tribunal in that case. *Vide Maharani Hiranath Koer* v. *Baboo Ram Narayan Singh,* 9 B. L. R., 324 to 327; *Naraganti Achammagaru* v. *Venkatachalapati Nayanivaru,* I. L. R., 4 M., p. 267; *Bhawani Gulam* v. *Deoraj Kuari,* I. L. R., 5 A., 548.

The decision of the High Court in the *Saptur* case was in accordance with two of its prior decisions, *viz.*, the one reported in *Naraganti Achammagaru* v. *Venkatachalapati Nayanivaru,* I. L. R., 4 M., 250 and the prior unreported decision in *Ramia* v. *Ranganayakamma* which was followed in that case.

The latter case is referred to and explained by Mr. Mayne in para. 499 and the former in para. 500 of his Treatise on Hindu Law and Usage, 5th edition.

In both these cases the principle laid down is that "when impartible property passes by survivorship from one line to another, it devolves not necessarily on the coparcener nearest in blood but on the nearest coparcener of the senior line."

In these three cases the decision was based on the law of succession by survivorship obtaining in an undivided family possessing partible property *plus* the principle of representation which obtains in an undivided family. In the *Saptur* case according to the said decisions even if the competition had been between the full brother and the half-brother's son, grandson or great grandson, the half-brother having pre-deceased the last proprietor, the decision would have been against the full brother. For in an undivided family a

deceased member is fully represented by his lineal male descendants up to three generations next to him, *vide* Mayne, para. 247. In the *Saptur* case the priority over the full brother was claimed by reason of seniority in age without having to base it upon representation of ancestor who was senior in age to the full brother. The Full Bench decision of the Allahabad High Court in *Debi Parshad* v. *Thakur Dial,* I. L. R., 1 A., 105, followed by a Full Bench of the Calcutta High Court in *Bhimul Doss* v. *Choonee Lall,* I. L. R., 2 C., 379 contains a very clear exposition of the Law of Mitakshara regulating succession in an undivided family and the operation of the doctrine of representation therein. In the case of a separated owner who dies leaving a brother and a nephew, the brother of course excludes the nephew, whether the estate of such a separated owner is a partible or an impartible one.

If he be an undivided member his undivided share in partible joint property would devolve equally on the brother and the nephew and the fact of the nephew being a remoter kinsman than the brother is immaterial and if the estate were an impartible one and the nephew be the son of the brother who was senior in age to the surviving brother, by the principle of representation obtaining in an undivided family the nephew by representing his father takes the property in preference to his uncle.

If as laid down by the Privy Council notably in I.L.R., 18 C., 151, succession to an impartible estate is to be regulated by the rules applicable to partible property except in so far as the incident of impartibility necessitates the vesting of the succession in a single heir instead of in a plurality of heirs the marked distinction which obtains under the Mitakshara School in regard to succession by survivorship in an undivided family aud succession by inheritance to separate property should not be ignored in determining the right of succession to an impartible estate. The cardinal principle of succession to separate or self-acquired estate is that the nearer excludes the more remote. But that principle is entirely alien to the rule of succession by survivorship in an undivided family. Therefore, when one has to trace the succession to an impartible estate in an undivided family, the question as to which of the surviving members is the nearst of kin to the deceased is perfectly immaterial. That, no doubt, is the criterion in all cases under the

Dayabhaga Law and also in the Mitakshara School when one has to trace the succession to the separate estate of a deceased owner. But in an undivided family that is no criterion at all under the Mitakshara School. Under that school it should be determined how the undivided share of the deceased would devolve upon the surviving members, if the estate were partible; and because the estate is impartible, only one of them has to be selected and in the absence of any custom or usage to the contrary, that person should be the one who is senior in age or represents one, who, if alive, would by senioity of age be entitled to the succession. When such a one claims the right of primogeniture by the principle of representation obtaining in an undivided family such claim is based upon law and not upon lineal primogeniture by custom. If in claiming succession to the impartible estate of a separated owner or of one whose self-acquisition it was, a claim by lineal primogeniture were advanced that would have to be established by custom, for, in the case of a separated owner it is contrary to law that one who is remoter of kindred, say, a nephew should claim to succeed in preference to one nearer of kindred, say a brother. In *Achel Ram* v. *Udai Pertab*, L. R., 11 I. A., p. 51, referred to by Mr. Mayne in para. 501 of his treatise on Hindu Law, the last male owner was succeeded by his widow and daughter successively and on the death of the latter a contest arose between two persons claiming as reversionary heirs entitled to succeed on the death of the daughter. The rule of succession applicable to the case, therefore, was the rule of inheritance applicable to separate estate and not the rule regulating the right of succession by survivorship in an undivided family under the Mitakshara School. In that case the plaintiff claimed succession by right of lineal primogeniture in preference to a surviving reversionary heir who was nearer of propinquity to the last male owner. But the Privy Council rejected his claim on the ground that his right based upon lineal primogeniture was not established by custom. The claim advanced by the plaintiff in that case was contrary to the cardinal principle of succession applicable to separate property and, therefore, it could not be recognized unless based on a custom which should be established. But if the claim had been one of succession by survivorship as a member of an undivided family his advancing the claim of lineal primogeniture on the principle of representation obtaining in an un-

divided family would not be one outside the rule of Hindu Law but one based upon and in conformity with it.

Mr. Mayne tries to reconcile all the cases bearing on the subject by deducing therefrom the four rules which he lays down in para. 502 of his book.

The cases are cited and explained by him in paras. 499, 500 and 501 of his book. The Madras cases cited in paras. 499 and 500 relate to succession to an impartible estate by right of survivorship in an undivided family. The Privy Council case referred to and explained in para. 501 in which the claim by lineal primogeniture was advanced related to succession to the separate impartible estate of the last male owner. There is, therefore, nothing to reconcile between the Madras cases and the Privy Council cases. On the contrary, the Madras cases illustrate the rule of succession to an impartible estate on the analogy of the rule of succession by right of survivorship applicable to joint partible property; and the Privy Council decision illustrates the rule of succession to a separate impartible estate on the analogy of the rule of succession to separate partible property.

Mr. Mayne towards the end of para. 499 notices the *Tipperah* case apparently with approval and tries to reconcile it with the Sivaganga case reported in *Katama Natchiar* v. *The Rajah of Shivagunga*, 9 M. I. A., 549. As already explained the *Tipperah* case is perfectly irreconcilable with the previous and subsequent decisions of the Privy Council and of the High Courts of Calcutta, Madras and Allahabad in cases governed by the Mitakshara law, if one assumes that the *Tipperah* case is applicable to cases governed by the Mitakshara School, notwithstanding that the law governing that case was the Dayabhaga Law.

Mr. Mayne has dealt with this question not as fully as one might expect and he has failed to advert to several decisions of the Privy Council bearing on the question.

The first rule deduced by him from the decisions in para. 502 is as follows: "When an estate descends to a single heir the presumption is that it will be held by the eldest member of the class of persons who would hold it jointly if the estate were partible." Applying the rule to the *Saptur* case the half brother would be entitled to succeed in preference to the full brother. For if the

estate were partible, after the death of the eldest brother both his half brother and his full brother would hold it jointly. But the 2nd rule is as follows: " In the absence of evidence to the contrary, the heir will be the eldest member of those persons who are nearer of kin to the last owner than any other class and who are equally near to him as between themselves." If this rule be restricted to the case of succession to a separate impartible estate it is quite correct. But if it be meant to apply to cases of succession by survivorship to an impartible estate in an undivided family it is not correct and is not in accordance with the first rule.

Then the third rule is as follows :—

" Special evidence will be required to establish a descent by lineal primogeniture that is by continual descent to the eldest member of the eldest branch in exclusion of nearer members of younger branches" and if this is restricted to cases of succession to a separate impartible estate the rule is sound and is in accordance with the decision of the Privy Council in *Achel Ram* v. *Udai Pertab*, 11 I. A., p. 51. But if it be meant that in cases of succession by survivorship to an impartible estate in an undivided family special evidence will be required to establish a descent by lineal primogeniture even within the limits of representation obtaining in an undivided Hindu family, the rule will be unsound and not in accordance with the principles of Hindu Law.

The fourth rule is stated as follows :—

" The presumption as to primogeniture of either sort may be rebutted by showing a usage that the heir should be chosen on some other ground of preference" and the rule is quite correct. It was illustrated in the *Saptur* case by the custom set up.

These rules, however, have to be entirely recast by distinguishing cases of succession by inheritance to separate impartible estates from cases of succession by survivorship to an impartible estate which for purposes of succession should be treated as joint family property.

JURISPENDENCE.

## NOTES OF INDIAN CASES.

**Dharam Singh** v. **Angan Lal**, I. L. R., 21 A., 301. The cause of action against the son for a personal debt due by the father is distinct from the cause of action against the father himself. The liability of the son to pay the father's debt arises from the so-called pious obligation. When this cause of action arises, whether at the date of the debt itself or at the father's death when the debt was subsisting at the father's death is not the question for consideration in the case under notice. That the son's liability is distinct from that of the father is clear. If so, after a decree has been obtained against the father and it becomes unexecutable against the son by reason of the father's death and execution is for some reason refused, the son can be proceeded against in a separate action if that is within time. If the cause of action against the son arises within the father's life-time, it can only arise when the liability accrues against the father himself. The Madras High Court has held I. L. R., 22 M., 49 that the obligation of the son arises at the same time when the father's liability accrues. This is no doubt the logical result of the decisions of the Privy Council. There will undoubtedly be some anomalies as where the father is indebted, execution being kept alive, the son becomes free because the time has expired from the date of the accruel of the liability. But we fancy it is impossible to steer clear of all anomalies in any view of the matter; and perhaps the logical extension of the Privy Council view is as good as any other view of the question.

**Chetan Charan Dass** v. **Baladra Dah**, I. L. R., 21 A., 314. Judgment having been reserved and one of the parties having died, the question has been raised whether the Court is competent to pronounce judgment. It is held in the case under notice that judgment might be entered *nunc pro tunc*. This has been the clear English practice and we have now the authority of the Allahabad High Court in accordance with the Bombay Court and an observation of the Privy Council that that practice may well be extended to India.

---

## SUMMARY OF RECENT CASES.

*Principal and Agent—Contract by Agent in the name of Principal—Benefit of Agent—Withdrawal from Contract—Ratification by Principal.*

*In re* **Tiedemann and Ledermann Freres** [1899] 2 Q. B.

The question that arose in this case was whether when an agent makes a contract in the name of his principal but really for his own

benefit, it is open to the principal subsequently to ratify the contract and whether if so the right of ratification can be exercised after the persons with whom the agent contracted, having come to know that the agent really contracted for his own benefit have rescinded the contract and refused to proceed with it. The Court of the Queen's Bench (Darling and Channell, JJ.) held that it was well established that the principal could ratify a contract made for him by his agent though without any antecedent authority (see *Wilson v. Tumman*, [1843] 6 M., & W 236, and *Foster v. Bates* [1843] 12 M. & W., 226) that the fact, that the agent really intended to benefit himself did not alter the right of the principal to ratify the contract especially when it was within his power to carry it out, and that under the decision in *Bolton Partners v. Lambert*, 41, Ch., D 295 it was open to the principal to exercise his right notwithstanding the previous repudiation of the contract by the other parties to the contract.

---

*Contractor's Negligence—Employer's Liability—Casual or Collateral negligence—Practice—Separate defences—One defendant paying into Court —Verdict for less amount—Liability of the other for costs.*

## Penny v. The Wimbledon Urban District Council
[1899] 2 Q. B. 72 C. A.

A contractor under the defendant Council dug up a road frequented by the public and left a heap of soil without any light to warn the passers-by of the state of the highway. A person fell over the heap and was injured. The question was whether the defendant Council were liable for the contractor's negligence. The Court of Appeal (*A. L. Smith, Vaughan Williams, and Romer*, L.JJ.) in confirmation of the decision of Bruce, J. held on the authority of *Pickard v. Smith*, 10 C..B. (N.S.) 470, that where the injury arose not from any casual or collateral negligence of the contractor but from negligence in respect to a matter which ought to have been foreseen from the very nature of the work and provided for, the employer could not escape liability by pleading the negligence of the contractor.

In this case the defendant Council and the contractor had put in different defences. The contractor while raising a defence to the action, deposited 75 £ in satisfaction of the plaintiff's claim for damages. The plaintiff eventually recovered only 50 £ as damages for his injury. According to the rules of the Judicature Act, therefore, the plaintiff was not entitled to any costs from the contractor. The defendant

Council contended that they were not liable to costs either, because if the plaintiff had drawn the 75£ deposited into court by his co-defendant, he would have had no more claim against the council and not having done so he was entitled to costs from none of the defendants in the case. The Court of Appeal overruled this contention and held that if they had adopted the defence of the contractor and pleaded the payment by him, they might have succeeded, but that having raised a separate defence and paid nothing into court in satisfaction of the cause of action against them, they were liable to pay the costs of the plaintiff.

---

*Practice—Judgment by Default—Action to set aside the Judgment for fraud—Claim for malicious presentation of Bankruptcy Petition—No allegation of special damage—Striking out claim as disclosing no cause of action.*

## Wyatt v. Palmer [1899] 2 Q. B. 106.

A solicitor obtained judgment for his costs behind the back of his client whom he fraudulently induced to absent himself from court and refrain from having the bill of costs taxed in court. He subsequently presented a petition to have the client declared a bankrupt. The client now brought this action to have the judgment declared null and void on the ground of fraud and to recover damages for the false and malicious application to the court to have him declared bankrupt. It was contended by the defendant that a judgment by default could not be questioned in a separate action for fraud and that the claim for damage could not be sustained without an allegation of special damage. The court of appeal (*Lindley, M. R. and Rigby, L.J.*) in affirming the decision of Kennedy, J. said that there was no authority to support the view that the judgment by default any more than other judgments were not liable to be set aside for fraud in a separate action, that the existence of a summary method of setting aside a judgment by default did not put an end to the right of the plaintiff to impeach the judgment by action; but that in a proper case it might be advisable that the court should insist upon the plaintiff paying the amount due upon the judgment before allowing the action to proceed. On the other question they said that it was not quite clear that there should be an allegation of special damage but that whatever might be the law upon the subject it was not so clear a point as to justify the court in striking out the claim as disclosing no cause of action or as frivolous or vexatious.

*Administration action—Distribution among next-of-kin—Previous knowledge of Proceedings—Delay—Laches.*

**Mohan v. Broughton** [1899] Ch. P. D. 211.

On the death of one Coghlan, letters of administration were granted to one Broughton as the deceased's cousin and next-of-kin on the 24th December 1892. Then a suit was commenced in the Chancery Division for the administration and distribution of the assets among the next-of-kin of the deceased. On the 10th March 1893 a claim was put forward by one Crosdil to be exclusively entitled to the estate of the deceased on the ground that the administrator and the other next-of-kin between whom the Chancery suit was proceeding were not related to the deceased as the deceased's mother whom they claimed as their aunt was illegitimate having been born before the marriage of her parents. This claim was dismissed and the clerk certified on November 3, 1893, that the parties to the Chancery suit were the only next-of-kin of the deceased. On the 31st May 1894, the plaintiff in this case first put in a claim, alleging that she then came to know of her relationship to the deceased and that she was entitled as first cousin once removed. On the clerk pointing out that even if she proved herself to be the first cousin once removed, she would not be entitled to any share as there were first cousins in existence, the proceedings were stopped and the plaintiff took no further steps to prosecute her claim. On December 11, 1894, an order was made for distribution which was carried into execution immediately after. On April 21, 1896, a final order was passed directing the payment of a small balance to Broughton. On the 7th June 1898 the present action was commenced on the allegation that the parties to the Chancery suit had no claim because Emma Broughton the mother of the deceased was illegitimate. This action was resisted on the ground that the question of the legitimacy of Emma was *res judicata,* because it had been already decided and because it ought to have been raised by the plaintiff in her previous claim, and that the plaintiff was guilty of such laches as debarred her from prosecuting her claim. *Gorrel Barnes,* J. held that it was unnecessary to decide the question of *res judicata,* that the plaintiff having become aware of the proceedings and of the question of Emma's legitimacy as early as 1893, and yet not having taken any steps to push on her claim till more than 3 years after the distribution of the assets among the next-of-kin she must be deemed to have acquiesced in the Chancery proceedings and could not now be allowed to claim a refund of the assets already distributed.

---

*Foreign judgment—Divorce—Irregularity in Procedure—Recognition by English Court—Jurisdiction.*

### Pemberton v. Hughes [1899] 1 Ch. 781, C. A.

An action was brought by a widow for a declaration that under a settlement executed by her deceased husband she was entitled to an annuity of £200 upon the security of certain properties which were settled upon her husband and others successively for life with a power to create a rent-charge upon them for the benefit of the wives of the several tenants for life. The persons who became entitled to the properties in possession at the death of her husband, disputed her claim on the ground that she was not validly married to the deceased tenant for life. This plea was based upon the fact that she and one Erwin were domiciled and married each other in the State of Florida in 1884 and that the decree for divorce passed in 1888 in favour of her husband Erwin in an undefended action for divorce on the ground of her ungovernable and passionate temper was invalid because ten clear days did not intervene between the date on which the writ was issued against the defendant and the day on which it was returnable, as required by the rules of procedure obtaining in Florida Courts. This plea was allowed by *Kekewich*, J.

On appeal it was held by the Court of Appeal (*Lindley*, M. R., *Rigby* and *Vaughan Williams*, L.JJ.) that where the foreign court was competent to entertain the suit and to require the parties to attend and answer the suit in court, a decree passed by it will not be questioned in English Courts unless it offends against English views of substantial justice and that a mere irregularity in the application of municipal rules of procedure was not a ground upon which the English Court would go behind the adjudication of a foreign court.

---

*Fraudulent conveyance—Confusion with the property of the person to whom conveyed—Creditor's action assets. Following—*

### *In re* Mouat. Kingston Cotton Mills Company v. Mouat, [1899] 1 Ch. 831.

Where a voluntary assignee of two policies of insurance collected the amount of the policy on the death of the assignor and advanced it together with other monies of her own upon a mortgage and on the estate proving insolvent, creditors brought an administration action impeaching the validity of the assignment under the statute of Elizabeth

and applied to the court for an order directing the payment of the moneys into court or appointing a receiver, it was held by *Stirling*, J. that it was clear that if the assignment was invalid under the statute of Elizabeth, the court had jurisdiction to secure the fund as assets of the deceased liable for his debts, that the fact that the moneys belonging to the deceased had been mixed with those of the assignee did not oust the jurisdiction of the court so long as the moneys had not passed into the hands of a *bona fide* purchaser for value without notice and that the assignee ought not to be allowed either to receive the mortgage moneys so far as they represented the amount of the policy or to part with the mortgage except after notice to the plaintiffs and with the sanction of the court.

---

*Bankruptcy—Fraudulent preference—Breach of Trust—Conveyance to Beneficiary—Bankruptcy Act*, 1883, *s.* 48.

**Sharp** v. **Jackson** [1899] A. C., p. 419 H. L. (E).

A trustee had committed breaches of trust and on the eve of his bankruptcy transferred an estate of his to a trustee for the purpose of raising money thereby and rectifying the breaches of trust committed by him. Subsequently on his own application he was declared a bankrupt and his trustee in bankruptcy claimed to have the alienation set aside on the ground of fraudulent preference. *Vaughan Willliams, J.*, in the court of first instance and the Court of Appeal consisting of *Lord Esher* M. R. and *A. L. Smith and Chitty*, L.JJ., gave judgment for the defendants. On appeal the House of Lords agreeing with the Court of Appeal held that in order to make out a case of fraudulent preference it was not sufficient to prove merely that an advantage had been given to one creditor over another, but it must be proved further that the preference was an act of unrestrained voluntary choice on the part of the insolvent, that therefore, a preference whether resulting from external pressure brought to bear upon him by the creditor as in *ex parte Taylor*, 18 Q. B. D., 295 or from the internal pressure of the apprehension of impending danger real or imaginary as in the case of *Thomson* v. *Freeman* (1886), T. R. 155, was equally involuntary and could not be said to be a "fraudulent preference" or even a "preference" in the correct sense of the word and that the conveyance, brought about as it was, from an apprehension of a near prosecution for breach of trust, could not be avoided on the ground of fraudulent preference within the meaning of the Bankruptcy Act.

---

*Company—General Meeting.—Director's interest in the Resolutions—Omission to state in Circular—Conditional notice of Meeting.*

**Tiessen v. Henderson** [1899] 1 Ch. 861.

Two questions arose in this case, whether when the circular giving notice of a general meeting of a company for the purpose of passing certain special resolutions did not mention that the directors of the company were interested in the passing of the resolutions, the resolutions passed by the meeting could be avoided on the ground of insufficient notice ; and whether a notice of two meetings to be held successively for the consideration of two alternative resolutions (the second resolution to be taken up in the event of the first being rejected), was a valid notice.

On the first point *Kekewich* J. held, following the case of *Kaye* v. *Croydon Tramways Company* [1899] 1 Ch., 358, that since the case of *Foss* v. *Hardbottle* [1843] 2 Hare, 461, which practically decided that the absent and dissentient members of a company were bound by the vote of the majority, it was the duty of those who convened a general meeting to put the matter fairly before the meeting and in order to do so cause to be circulated among the shareholders all informations necessary to enable them to decide whether they ought to be present at the meeting or whether they might safely leave it to decide for them, that in this case the material fact of the interest possessed by the directors in the resolutions not having been notified to the shareholders, they were entitled to avoid the resolution passed without such disclosure.

On the other point he held that the case of *Alexander* v. *Simpson*, 43 Ch. D. 139 on which reliance was placed in support of the contention that the notice was invalid, had no application to this case, that here there was no uncertainty as to when or where the meeting was to be held as there was in that case, and that the mere fact of the two meetings being formally different and of the consideration of the second resolution being conditioned on the rejection of the first, did not make the notice invalid.

---

*Mortgage—Power to sell out of Court—Sale to Solicitor—Suit to cancel—Laches.*

**Null v. Easton** [1899] 1 Ch. 873.

The executrix of a mortgagee of reversion having obtained probate sold the reversion to a solicitor in *bonâ fide* excercise of the power of sale out of court reserved by the mortgage. The solicitor gave immediate notice of the sale to the purchaser of the equity of redemption

from the reversioner. The purchaser of the equity brought this action after the lapse of ten years to set aside the sale on the ground that a sale to the vendor's own solicitor was invalid. On the evidence in the case it was found that the solicitor had acted for the executrix in obtaining probate, that on being subsequently asked by her to find a purchaser for her, he with great reluctance promised to become the purchaser himself if she found nobody else to take it and that finally he purchased it for more than its actuarial value.

On these facts *Cozens-Hardy* J. held that the mortgagee was not a trustee for sale on behalf of the mortgagor, that according to the most recent cases (see 40 Ch. D. 395 and [1897] A. C. 180) it would be impossible to impeach a sale made in good faith and without any unfairness to the mortgagor, that moreover the solicitor was in no way acting for the vendor at the time of the sale to him and that even supposing that he was her solicitor and could not legally buy the reversion, the right to avoid the sale was lost by laches and acquiescence on the part of the plaintiff who knew of his rights 10 years before the date of the action.

---

*Vendor and Purchaser—Action for specific performance—Disorderly house.*

## Hope v. Walter [1899] 1 Ch. 879.

A certain house was sold by auction. The description given of the house was in all respects correct and unambiguous. But the tenant who was in possession used the house as a disorderly house, of which fact the purchaser subsequently became aware and refused to complete the sale. Under the terms of the lease the tenant was liable to be ejected without notice if he used the house in a disorderly manner.

In the action for specific performance brought by the vendor, it was admitted by the defendant that he was not aware of the misuse of the house, but it was contended for him that both parties having been under a mistake as to the property put up for sale, the defendant was entitled to rescind the contract and that the court ought, in its just discretion, to refuse specific performance on the ground of hardship.

The Court held that according to the observations of *Wigram* V.C. in *Lucas v. James*, 7 Hare, 410, the existence of a nuisance in the house unknown to the parties was not a ground upon which a sale of specific property could be avoided, especially where the purchaser could, under the terms of the tenancy, expel the tenant without notice in case of disorderly user.

## CORRESPONDENCE.

To

THE EDITOR,

*"Madras Law Journal."*

SIR,

I observe in your issue for August last in discussing the question of "Primogeniture among Mothers" you say at p. 278. "In the Uttumalai case Mr. Justice Best, though he does not definitely decide the point, strongly indicates his opinion that when the succession is to the son and not to the husband, priority of marriage is not the criterion for determining the right of primogeniture." Such, however, is not an inference that can be properly drawn from the judgment which is reported in I. L. R., 18 M., 277. The following is an extract from the judgment (p. 280):—"As has been contended on behalf of appellant seniority in the family of the husband must be calculated from the date of the entry of each wife into that family by marriage, &c. So calculated, the appellant is clearly the senior wife—the *Dharmapatni*, the wife married from a sense of duty" and the attributes for her we then mentioned. The words that follow, "However the question here is not as to the succession of wives to a husband, but of a mother to an adopted son" cannot be taken to indicate an opinion that a different method of estimating seniority would have to be adopted in the latter case.

Yours faithfully,

*12th October* 1899. J. W. B.

---

## JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks receipt of the following publications:—

*The Indian Court Fees Act* by Dasai Narotam to be had at *Srinivasa Varadachari and Co., Madras*:—Price Rs. 3-0-0.

*The Hindu Law with Sanskrit Texts* by P. Adinarayana Patro, printed at the *Varthamanatarangini Press, Madras.*

*Commentaries on the Code of Civil Procedure* by Hukm Chand, M.A., printed and published by *The Bombay Education Society Press.*

*Hindu Law relating to the liability for debt and alienation for the same* by V. Suryanarayana Pantulu, printed by *D. V. Kristnan and Co., Bellary.*

Sind Sadar Court Reports, Vol. 1., No. 3. (*in exchange.*)

The Bombay Law Reporter for September (*in exchange*).

The Albany Law Journal for September (*in exchange*).

The Calcutta Weekly Notes for September (*in exchange*).

The Allahabad Weekly Notes for September (*in exchange*).

The Green Bag for September (*in exchange*).

The Canadian Law Times for September (*in exchange*).

The Canada Law Journal for September (*in exchange*).

The American Law Review for September and October (*in exchange*).

The Kathiawar Law Reports, from January to October (*in exchange*).

The Chicago Law Journal, Vol. IX., parts 1 to 7 (*in exchange*).

The Ceylon Law Review, Vol. I., No. 4 (*in exchange*).

***

*The Bench and the Bar :—His honor Mr. Joseph.*—We have often had occasion to remark that the successful administration of justice requires the maintenance of friendly relations between the Bench and the Bar. Both interest and duty combine to make the members of the bar habitually respectful and deferential to judges. But we are sorry we cannot say that all judges realize it to be their interest or duty to adopt a courteous and considerate tone towards the practitioners appearing before them. We think it is the duty of the Judges of Superior Courts to impress upon the Judges of Subordinate Courts the necessity of a considerate treatment of the Bar. We regret to note that some of the District Judges do not sufficiently realize the obligations of courtesy in their relations with the Bar. We have been told that the relation between Mr. Joseph, District Judge at Trichinopoly, and the practitioners appearing before him have been neither pleasant nor smooth. Quite recently some Vakils from the High Court appeared before Mr. Joseph and from what we hear of what passed at the hearing of the cases in which these gentlemen were engaged, Mr. Joseph appears to be both discourteous and utterly ignorant of the forms of forensic speaking. One of these Vakils referred to the contentions of his opponent by saying "you contend" and he proceeded to meet the argument. This offended Mr. Joseph who seems to think that a practitioner must

not use the word *you* at all on the ground that if it is addressed to the Judge it is disrespectful, and if it is addressed to the opponent, the vakil has no right to do so. Mr. Joseph found fault with the vakil for his language and insulted him by charging him with ignorance of English and want of respect to the Court. While we do not desire to adopt the *tu quoque* argument we cannot help thinking that it was the District Judge who displayed rudeness and ignorance of English. The other vakil we referred to began one of his arguments by saying "suppose so and so." The District Judge at once interrupted him and said that he was not going to make any supposition. The vakil had then to begin his argument by saying "I will suppose so and so." We are told that Mr. Joseph's treatment of the local bar is worse. Rude interruptions of this kind must necessarily disconcert any practitioner and interfere with the due discharge of his duties. Mr. Joseph does not seem to be aware that even in addressing Judges or even much higher officials like the Governor or the Viceroy, the use of the words you or your is permissible. Mr. Joseph will do well to have a copy of Webster's Dictionary on his table in the court-house.

Friction between the Bench and the Bar is not a merely personal matter. It is apt to result in great injustice, for, once in a temper, the Judge is apt to refuse a patient hearing of the practitioner or fall into an attitude of hostility to the party whom the practitioner represents. The Bench loses greatly in dignity and the Public loses its confidence in the impartiality of the Court.

***

*Mr. Joseph again*:—Mr. Joseph seems to be a man of peculiar ways. Criticism renders him more obstinate and he is more incorrigible when his errors are pointed out. The High Court has in numerous instances set aside his judgment as not in conformity with S. 574 of the Code. His judgments in criminal cases have in several instances been shown to be one-sided; and yet he has not shown himself capable of profiting by criticism. Sometime ago he put a notice calling upon practitioners to give him a list of the authorities proposed to be quoted by them in each case, a day previous to the hearing. He appears to have asked the Superintendent of Police to enquire how the savings of Legal Practitioners are invested to ascertain whether any of them are doing the business of money lending. We do not know how long Mr. Joseph is to be permitted to indulge in his career of wanton insult to the Bar. As a member of the Covenanted Civil Service he appears to feel that the High Court can do him no harm. But the Government can. We hope some body will invite their attention to him.

***

*Ethics of Advocacy*:—Our readers are likely to have noticed an important extract we made in a former issue from an article in the Law Quarterly Review upon the Ethics of Advocacy. Attention was pointedly drawn to the subject by Mr. Justice Subrahmanya Aiyar of the Madras High Court in the course of the hearing of a second appeal. The question dealt with in the extract and by Mr. Justice Subrahmanya Aiyar related to the duty of practitioners in the citation of cases against their clients. Is a practitioner bound to cite cases that are in point though in support of the opposite side? The question is not altogether easy of solution and the answer depends a good deal upon an exact understanding of the relation of the profession to the Bench. One fact must be remembered that the members of the profession are not the mere agents of the parties for whom they appear. The duty of the mere agent to act entirely in the interests of the principal is perfectly clear. But every agent that a party may select is not admitted to the ranks of the profession. The body is one specially created and the suitor is at liberty to employ any member of that select body. Now, if the conditions of the existence of the profession are that every member should aid the Court with the knowledge he possesses on any question whether for or against his client, the answer to the question already put would be clear. But in the absence of a statutory or any other definition of the conditions under which the profession is called into existence, the standard of duty depends upon the general understanding of the profession as handed down through generations of lawyers.

If there is an understanding that the practitioner is expected to cite all cases for or against his client, there is no violation of the duty he owes to his client or any betrayal of his interests. The question then resolves itself into whether there is such an understanding by common consent. If there is not, would it conduce to the best interests of the public that there should be implied such a condition attaching to the practice of the profession. We think that in cases of this description whatever difficulty there may be in answering particular questions which may be on the border land, the general line of demarcation is clear. A practitioner who is regarded as an officer of the court and enjoys privileges which a mere agent can never enjoy is bound to inform the Court if he is aware of any cases in point that militate against his client's case. If in his opinion the cases are distinguishable, or it is difficult to decide whether the case seemingly against him is really so, he is not bound to decide the question and thus usurp the functions of the Judge. It cannot be said that he is bound to look up authorities that are against his client, for such a view will tend to the extinction of the profession itself. The prin-

ciple of each party retaining an advocate is that the best that can be said on each side should be brought up before the court to enable it to arrive at a satisfactory conclusion. It is not salutary to lessen the weight of responsibility by making the advocate on each side a judge for the time being. The work of the court will be best performed by the advocate on each side doing the best for his client.

Such a duty is not necessarily inconsistent with the advocate being required to state to the court what he knows to be directly in point and against him. The suppression of that knowledge has the necessary appearance of sharp practice; and both in the interests of individual morality and of the public at large he ought to be made to do that duty even, if necessary, under penalties.

***

*Lord Watson* :—The death of Lord Watson is an Imperial as well as a National loss. The unanimity with which the legal profession throughout the dominions of the Queen will record this verdict, as the news of the fresh blank in the ranks of our judiciary spreads, will take the non-legal world by surprise. The tribunals in whose labours Lord Watson has for almost twenty years taken so great a part, are unfamiliar to the ordinary *habitues* of the Law Courts. The cases on which they adjudicate are seldom sensational and usually raise issues of pure and often not even of English Law. Add to these considerations the facts that Lord Watson's forensic career had been pursued in Scotland, and that during his judicial life in England, with characteristic modesty and directness of purpose, he confined himself strictly to the work that he had come here to do, and it is not difficult to understand the astonishment with which many people will learn that in the estimation alike of Bench and Bar, the unassuming Scotch law lord who has just passed away was one of the greatest judges of the Century. There can be no doubt, however, that this is the position that Lord Watson will take and retain in our judicial history. That a lawyer trained under a legal system so essentially different in many of the vital points from the English as that existing under the law of Scotland, should have been able to bear a dignified and efficient part in the decision of English appeals, would have been of itself no slight achievement. Lord Watson's career at the bar had been practically a failure. But he had found his true vocation on the Bench, and he was fully aware of the fact and not long in showing his consciousness of it. He made himself a profound English lawyer. Within two years after his elevation to the Bench he delivered an elaborate judgment on a highly technical question as to prescriptive right to a several oyster fishery (*Goodman* v. *The Mayor of Saltara*), and from that time forward

down to the very end of his judicial career he held his own with a succession of intellectual giants—Cairns, Selbourne, Blackburn, Herschell, and the rest—grappling as ably as they did with problems with which he could have had little practical acquaintance before he became a judge, and permanently enriching the literature of English law. It was, however, in the Judicial Committee of the Privy Council that Lord Watson's great strength lay. His profound knowledge at once of English, Scotch, and Roman law peculiarly fitted him for dealing with the vast system of Imperial Jurisprudence which that tribunal has to administer; and in the services which he rendered to it he has had no superior, if indeed he can be said to have had an equal. The law as to the interpretation of British North America Act, the elucidation of the Roman Dutch Law to *legitimatio per subsequens matrimonium*, the conditions under which the prerogative right to hear appeals in criminal cases will be exercised, the immunity of consular judges from legal proceedings for acts done in their judicial capacity, the so-called 'Matrimonial domicil,' these and other numerous other subjects of not less importance owe their present definiteness, coherence, and accordance with sound public policy largely to the touch of Lord Watson's moulding hand. As a judge, Lord Watson had his shortcomings. He was prone to interrupt the arguments of Counsel, and his interruptions sometimes tended to assume proportions strongly reminiscent of a Scotch sermon of the olden time. But he was always open to argument; and he never failed in good humour, courtesy or consideration:—*The London Law Journal.*

[We beg to join in the humble tribute paid by our Contemporary to Lord Watson and cannot but add that the Judicial Committee of the Privy Council will be appreciably weaker by the loss of the striking personality of Lord Watson.—ED.]

***

*Damages—Breach of Contract for Adoption.*—In *Sandham* v. *Grounds*, decided in the U. S. Circuit Court of Appeals, Third Circuit, in May, 1899, it was held that the measure of damages for breach of a contract by one person to adopt another and make the latter an heir, under the law of Pennsylvania, is not the value of the share of the promisor's estate at his death which would have been inherited by the promisee, but the value of the services rendered or outlay incurred by the promisee on the faith of the promise, with interest.

It was further held that where a contract for adoption was to be performed in a certain State, and the estate to which the person to be adopted would thus have become an heir is there situated, the law of

such State governs as to the measure of damages for a breach of the contract.

The court said:

The plaintiff in this action brought her suit against the defendant, as administratrix of Samuel Smith, to recover damages for the breach of a contract entered into between the plaintiff and said Smith in his life-time, in and by which said Smith agreed that he would take the plaintiff (who was his niece) from her home in Ireland to America, adopt her as his daughter, and that he would so provide that at his death she should receive one-half part of his property. The plaintiff accordingly came to America with her uncle, and for a short time continued to live under his care and protection. During her stay she rendered no service, and after her departure, at the end of some sixteen months, she did not return to him. Smith never took any steps looking to the adoption of the plaintiff as his daughter according to the form of the statute of the State of Pennsylvania, but did so adopt an inmate of his house, who was a relative of his wife. The contract between Smith and the plaintiff was to be performed in the State of Pennsylvania, where Smith resided, and where he afterwards died intestate. Upon the trial of the cause the learned judge charged the jury, *inter alia*, as follows:

"Upon the question of the rule of damages the court charges the jury that for the breach of the alleged contract the measure of damages is not the value of decedent's estate at the time of his death, but the value of the services the plaintiff rendered the said Smith while she remained with him, and also any pecuniary outlay or expense she was subjected to or incurred, with interest."

To this part of the charge exception was taken, and the only question argued before us was whether the measure of damages was correctly stated. We cannot doubt that the damages in this case must be determined by the laws of the State of Pennsylvania, where the contract was to be performed, and where the assets of Smith's estate are properly distributable. We find, upon reviewing the decisions of the highest court of that State, that the question here at issue was set at rest in *Graham* v. *Graham's Ex'rs* (34 Pa., St., 475), in which the case of *Jack* v. *McKee* (9 Pa., St., 240), holding a contrary doctrine, was carefully considered and expressly overruled. In *Graham* v. *Graham's Ex'rs* (*supra*) the decedent agreed with two distant relations that, if they would come and live with him, they should share his property equally with his nephews after his death. He failed to carry out

his agreement, and suit was brought against his executors to recover the value of the promised shares of his estate. The plaintiff offered to prove the value of the decedent's estate, and the share of each nephew, for the purpose of showing the damage sustained by the plaintiff. To this offer the defendants objected on the ground that the measure of damages was the value of the services rendered, and was not to be governed by the value of the decedent's estate. *Strong*, J., said:

"Without pressing the insufficiency of the proof of the contract, * * * it by no means follows that the measure of damages in an action for its breach is the value of the thing promised at the time of the breach. *Jack* v. *Mckkee* (*supra*) is no longer a rule. This court has returned from the departure which was made in that case."—*The Albany Law Journal.*

***

*Action by wife for Alienation of husband's affections.*

LIABILITY OF PARENTS OF HUSBAND'S MISTRESS, ALLEGED TO HAVE INDUCED AND PROCURED COMPLETE ABANDONMENT OF WIFE.

*New York Supreme Court—Appellate Division—First Department.* July, 1899.

Present: Hons. Charles H. Van Brunt, P.J.; George C. Barrett, William Rumsey, Edward Patterson and George L. Ingraham, JJ.

Marie Kuhn, Appellant, *v.* Friedhold Hemmenn et al., Respondents.

Appeal by the plaintiff from a judgment entered upon the dismissal of her complaint at Trial Term.

The action was brought to recover damages for alienation of the affections of plaintiff's husband by the defendants. Plaintiff was married to Charles Kuhn in 1890, and in 1892 they moved to an apartment house where the defendants, who were the owners, resided. The defendants' daughter, Elsie Hemmenn, resided with them, and in 1893 Kuhn commenced an adulterous intercourse with this daughter. Discovering, in May, 1894, that she was in a delicate condition, he took her to an apartment house on Fifty-sixth street, where a child was born to them in July, 1894. The defendant Barbara Hemmenn frequently visited them at this place, and they were known there as Mr. and Mrs. Kuhn. In 1895 and 1896 they lived together as man and wife in a house on Seventy-seventh street, and while living there were

frequently visited by both defendants. At the time of the birth of the child above referred to, defendant Barbara Hemmenn said to the midwife who was commiserating her on her daughter's unfortunate predicament: "No matter, it may come out all right; may be she takes money and goes away, and he can marry her then." In 1894 Charles Kuhn, in the presence of Friedhold Hemmenn, referred to him as his father-in-law, and Hemmenn at other times spoke of Kuhn in the same year as his son-in-law, and of his daughter Elsie as Kuhn's wife. During all this time, and up to the date when she left for Europe in 1896, the plaintiff was living with her husband in the same house with the defendants, on good terms with them, but was entirely ignorant of the circumstances above referred to. Her husband was earning a good salary, and he was her sole support. She knew of Elsie Hemmenn's condition, but had been told by both defendants that a man named Heckman was responsible therefor. She knew nothing of her husband's infidelity until her return from Europe in 1896. Admissions of Friedhold Hemmenn were proved to the effect that he furnished money to Kuhn to stand the plaintiff to Europe, and that he promised to pay all the cost of divorce proceedings and to set him up in business if he would marry his daughter. It was also shown that shortly after the departure of the plaintiff for Europe both defendants stated to friends of hers, who had ascertained the true situation, that she "was not worth to have a man like this," and that it was "a pity such a fine, elegant man should be married to such a common, ordinary woman." Within a short time after plaintiff's departure Kuhn and Elsie Hemmenn moved into the house adjoining the defendants, which was also owned by them, and a few months later into the very apartments in the defendants' house formerly occupied by the plaintiff and Kuhn; and they lived there as man and wife. In May, 1896, and while plaintiff was still in Europe, and in ignorance of all these facts, Kuhn and Elsie Hemmenn went through a marriage ceremony, which was performed by a Lutheran minister, who had been for many years a personal friend of the defendant Friedhold Hemmenn. The latter accompanied them, and when the clergyman (who relied solely upon Hemmenn's word) inquired whether Kuhn had been divorced with a right to re-marry, he replied that "it was all right." Hemmenn also signed the marriage certificate as a witness. On the same day the child was baptized by a minister of another denomination. Plaintiff returned from Europe shortly after this, and found Elsie Hemmenn living as Mrs. Kuhn in the apartments which had been occupied by Kuhn and herself when she went away. Charles Kuhn had then disappeared.

*Isidore Hershfield* for appellant; *Frederick H. Ernst* for respondents.

BARRETT, J.—It is well settled that a wife may maintain an action against one who has enticed her husband from her, or deprived her of the comfort of his society (*Bennett* v. *Bennett*, 116 N. Y., 584; *Jaynes* v. *Jaynes*, 39 Hun, 40; *Baker* v. *Baker*, 16 Abb. N. C., 293; *Breimann* v. *Pasch*, 7 Abb. N. C., 252; *Westlake* v. *Westlake*, 34 Ohio St., 621.) The defendants evidently misconceive the nature of the present action, for they content that it cannot be successfully maintained because of a lack of evidence to show that they had any knowledge of the improper relations existing between their daughter and plaintiff's husband until the child was born. They also assume that the entire wrong to the plaintiff was consummated when Kuhn entered upon his adulterous life with Elsie Hemmenn, and that no act of theirs subsequent thereto could add to the plaintiff's injury. They insist that the plaintiff's only remedy is a possible action for damages against their daughter. Their contention overlooks the fact that this action is not to recover damages sustained by the plaintiff as a result of the criminal conversation of her husband with Elsie Hemmenn, but for the loss of *consortium*. This is plainly the gravamen of the complaint. The damages claimed are alleged to have been sustained by reason of the plaintiff's deprivation—resulting from the defendants' acts and inducements—of the " comfort, aid, assistance, affection, support and maintenance " of her husband. Mere marital infidelity would not suffice to maintain such an action, for marital infidelity alone did not cause the wrongs of which the plaintiff is complaining. There is no evidence whatever to show that she was in any way deprived of the " comfort, society, aid, assistance, affection, support and maintenance " of her husband up to the time when she left for Europe. It is true that he was then, and had been for some time previous thereto, maintaining a mistress with whom he passed a portion of his time. But of this the plaintiff was in complete ignorance. He still continued to live with and support her; and he ostensibly fulfilled all his marital relations. It is clear, then, that there was up to this time no such alienation of affections as would have entitled the plaintiff to maintain an action like the present against these defendants (*Romaine* v. *Decker*, 11 App. Div. 22; *Buchanan* v. *Forster*, 23 App. Div. 344; *Hodecker* v. *Strickler*, 59 N.Y. Supp. 515, aff'd in 20 App. Div. 245).

Thus the only injury which plaintiff suffered up to the time of her departure for Europe was the moral injury resulting from the violation of her husband of his marital allegiance. It is for the additional wrong which the defendants subsequently caused to be inflicted upon her that she brings this action. This additional wrong consisted in the entire

abandonment of the plaintiff by Kuhn, his entering into a bigamous marriage with the defendants' daughter, and his taking the latter to the very apartments in the defendants' house which he had previously occupied with the plaintiff. This was the loss of the "comfort, society aid, assistance, affection, support and maintance" complained of by the plaintiff ; and that loss, and the defendants' responsibility therefor, were sufficiently shown, at least *prima facie*. The plaintiff was living with her husband in apparent peace and contentment up to the time of her departure for Europe. Sometime previous thereto the defendants talked of taking steps to get her out of the way. This was because of Kuhn's relations with their daughter, of which they were fully aware. Their admissions were given in evidence to the effect that they had told Kuhn that they would pay for a divorce and set him up in business if he would marry their daughter, and that they furnished him the money to send the plaintiff to Europe to get her out of the way. It was proved, too, that they connived at and encouraged the bigamous marriage with their daughter. We also find that they freely told various people that they considered Kuhn's lawful wife a common woman, much beneath him, and that they were doing all in their power to separate him from her. How well they succeeded has already been shown. If they had taken no steps at all in the matter, Kuhn might never have wholly abandoned his wife. At any rate, there was enough evidence to warrant the inference that they induced Kuhn to send her to Europe, with the idea of eventually getting rid of her entirely, and that by their influence and inducements they finally accomplished this latter purpose. Upon all the testimony it was certainly a question for the jury whether their wrongful influence and inducements were the cause of Kuhn's finally abandoning the plaintiff (*Remsen* v. *Hay*, 14 Week. Dig. 443). They cannot escape the consequences of their acts upon the plea of parental solicitude. While we may sympathise with them as parents, we cannot justify the means which they adopted to effect a partial rehabilitation of their daughter at the expense of an innocent wife.

The judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.—*The Albany Law Journal.*

***

*Legal Laugh:*—"Your worship," said the wily solicitor, who was defending the stalwart prisoner in the dock, "you cannot possibly convict my client of house-breaking. I submit, sir, with all deference, that neither morally nor legally can you convict him. I will tell you why.

"Mr. Sikes, here, as the evidence clearly proves, did not break into any house at all. He found the parlor window open, as the

witnesses admit, and all he did was to put in his right arm and remove some unimportant articles. Now, sir, Mr. Sikes' arm is not he himself, and I fail to see how you can punish the whole individual for an offence committed by only one of his limbs."

"Very well, sir," said the cautious Solomon of the Bench, "I have heard of a similar defence before to-day, so I find the prisoner's arm guilty, and sentence it to six months' imprisonment. The gentleman himself can accompany it or not, as he chooses. Mr. Clerk, read that sentence."

Then Mr. Sikes smiled a fourteen-inch smile, and the plan of the defence became apparent, as he quietly proceeded to unscrew his guilty cork-arm and leave it in the custody of the court.— *Tit-Bits.*

---

# REVIEWS.

*The Indian Court Fees Act* by Desai Narotam to be had at *Srinivasa Varadachari and Co., Madras*:—Price Rs. 3-0-0.

Mr. Desai Narotam has done a service to the Profession by annotating the Court Fees Act with all the decisions up to date. The Act is a clumsy old piece of work and the language and the provisions of the enactment deserve to be entirely overhauled. It is much to be regretted that an enactment which has to be constantly referred to should be so poorly drafted. Every annotation, therefore, which tends to throw light upon the meaning of any section or part of it is welcome. There is no original criticism attempted on the Act or the decisions cited. But we have no doubt that the book will be found useful as a repertory of decisions under the Act.

---

*The Hindu Law* by P. Audinarayana Patro, printed at the *Varthamanabarangini Press, Madras.*

We congratulate Mr. Patro on his new work on the Hindu Law. The field cannot be said to have been exhausted by the treatises already extant. The author follows Mr. Cunningham's method of stating the Law in the form of propositions consecutively numbered. Such an attempt has the necessary drawback of the absence of strict accuracy in the statement of the propositions. The author has made a useful departure in inserting the Sanskrit Texts upon which his propositions

are based. Much of it is necessarily elementary, but we are glad to note that in the chapter on Inheritance he has inserted the rules regarding pollution and inserted the list of persons qualified to perform the Sradh in the order of their competency. We hope that the book will be of use to the legal profession.

The Madras Law Journal.

PARTS X & XI.] OCTOBER AND NOVEMBER 1899. [VOL. IX.

## ADMINISTRATION OF JUSTICE IN MADRAS.

We have before us the report on the administration of Civil Justice for the year 1898. The order of Government on the reports in former years used to be a short abstract of the work done in the year under review, but in the present instance the Government have simply been pleased to record the administration of the report on Civil Justice. The change in the mode of dealing with the report is to us exceedingly welcome. Unless any questions of principle involving reform are raised in these Government Reviews, it serves no useful purpose to have a rehash of the figures contained in the High Court reports.

We do not propose to give an abstract of the work done by the various classes of courts in the Presidency, or to repeat our usual praise of the District Munsifs and our usual disapprobation of the higher ranks of the judicial service. There are, however, a few matters of interest which suggest themselves to us. In paragraph 5 of the report, the statement is made that the system of trial by Bench Courts under S. 9 of the Village Courts Act continued to be in force in the same districts as in the previous year. Looking at statement C; at page 42, we find the system of Bench Courts is not in force in some of the advanced districts of the Presidency, such as Tanjore, Trichinopoly and Malabar. We have no explanation as to why the system has not been extended to these districts, or more largely enforced in all the districts. We can imagine no other reason than the indifference of the Collectors of those districts to the question. The report does not proceed to deal with the advantages or the greater popularity of these Bench Courts in comparison with the Village Courts presided over by a single officer. If the figures are any test upon the matter, Village Courts as a whole, with 98,249 suits instituted in the year under review, seem to be increasing in popularity. We hope the

Government will call for the opinion of District officers generally as regards the best method of increasing the work and popularity of the Village Courts.

The report states that the disposals by District Munsifs in 1898 are the highest on record. We have more than once drawn attention in these pages to the fact of District Munsifs being over-worked. It appears that the average number of working days in the regular District Munsifs' Courts was 234 in the year. This is more than the average number of working days of the judicial officers of higher rank and accounted for by the difference in the period of the long vacation. It has more than once been suggested that the summer vacation of District Munsifs should be as long as that of Subordinate and District Judges, there being no reason why a class of judicial officers, whose mental strain is not less severe than that of officers of higher grades and who have shown themselves capable of turning out better and more satisfactory results than their better paid brethren, should not enjoy the period of mental and physical rest sufficient to renovate their energies. We hope the authorities will recognize the fact that even in matters of mental work there is such a thing as straining the mind beyond the limits of perfect recovery. Under the Civil Courts Act of Madras the power is vested in the High Court of fixing the period of the summer vacation up to a limit of two months. The Government has no voice in the matter, and the body that supervises the work of these judicial officers and has the best opportunity of acquainting itself with the nature and quality of the work turned out should have no hesitation in sanctioning the full period allowed by the law. We think the High Court should not merely record their satisfaction that during the year under review the District Munsifs disposed of 5,560 ordinary suits and 9,396 small causes more than in the year 1897.

We think the time has come when the Government ought to increase the jurisdiction of the City Civil Court to at least Rs. 5,000. There can be no doubt that the experiment has proved a signal success. The Court, moreover, has had the singular good fortune of being presided over by officers both able and popular. The Court has answered the best expectations of its well-wishers. We trust we shall not be considered disrespectful to the High Court,

if we venture the remark that cases now tried and disposed of by the City Court are better and more carefully tried than they would have been if their lot had been cast in the High Court; and we have no hesitation in saying that there is a considerable number of original suits still being tried on the Original Side of the High Court, in which there is a chance of better justice being rendered if they are transferred to the jurisdiction of the City Court.

Speaking of the Original Side, it occurs to us that a change ought to be made in the rule which practically dispenses with any record of evidence and leaves the party dissatisfied with the decree of the Judge of First Instance without the means of satisfying the Appellate Bench as to any error in the judgment of the First Court. That the Judges who happen to preside on the Original Side of the High Court are only too prone to err in their judgments is manifest from the large percentage of reversals notwithstanding the scantiness of the materials with which the appellant is supplied to attack the decisions of the Court of First Instance. It is said that the notes taken by the Judge of the evidence given at the trial are his property and that copies thereof should not be supplied to *either of* the contesting parties. This strange and somewhat novel doctrine which has come into vogue within the last three years of the High Court's history has been found to be productive of a not inconsiderable amount of injustice. It is often said that each party is at liberty to take his own notes and in not a few instances the spectacle is presented on appeal of the Bench in possession of one version of the appellant in possession of another and the respondent in possession of a third on points of material interest in the case. In cases of appeal, copies are supplied in England of the Judge's notes to each of the contesting parties. But if this doctrine of judicial property is to retain its hold upon the judicial mind, arrangements ought to be speedily made for evidence being taken by a sworn clerk in attendance. The matter was engaging the attention of the profession during the time of the late Chief Justice. But no definite step was taken as there was not much hope of reform in this direction during his Lordship's *regime*. We trust that an appeal will be early made to his Lordship the present Chief Justice, who while at the bar must have greatly felt the inconvenience of the present rule.

Paragraph 58 of the report deals with the financial results of the administration of justice. The total receipts and charges of Civil and Criminal Courts amounted in round figures to 64 and 49 lakhs respectively, leaving a surplus of 15 lakhs in favor of Government. We have repeatedly protested against the Government making a profit out of litigation. A Government on the verge of bankruptcy threatened with periodical famines and frontier expeditions is not likely to listen to a cry of excessive impost on litigation.

The convenient theory has been started that the people of India are notoriously litigious and the malady is sought to be kept under restraint by the heavy tax on Justice. We have never accepted the position that the people are prone to be litigious. We have often pointed out that the evil if any lay in the unmeaning refinements of adjective law which promote litigation. But, be this as it may, it is difficult to justify a tax which brings in more than the cost of both civil and criminal administration together and places a sum of 15 lakhs to the credit of Government. The receipts in Court-fee stamps on account of service of processes in Civil Courts, excluding discounts for sale of stamps at 1 per cent. on that amount, amounted in round figures to Rs. 12,80,000, and the Government have made a profit under this head of Rs. 6,80,000, *i.e.*, Rs. 69,000 more than in 1897. It appears to us that this extraordinarily large and increasing profit should not be pocketed by Government without a word of explanation.

The process fees ought to be reduced so as to make the receipts and expenditure balance each other. Again, the actual receipts in copy stamp papers in Civil Courts amounted to Rs. 2,36,000; excluding charges on account of their supply at 20 per cent. on that amount, the net receipts amount to Rs. 1,59,000. The surplus, therefore, under the Copyist fund amounted in round figures to Rs. 30,000. Now, what has become of these annual surpluses? Why should not the copying charge be reduced? We expect the report of the High Court, or the annual order of Government to say something on questions of this description. But we look in vain for information on these matters to these departmental productions. We trust some member of the Legislative Council will draw the attention of the Government to the points we have dealt with and elicit information from them.

There is a paragraph in the report about inspection of the Subordinate Courts by District Judges. We venture to ask the question how many of these officers are competent to make a satisfactory inspection of the Subordinate Courts. We do not know why the District Courts should not be inspected by some Judge of the High Court specially qualified for the task. We believe that many an irregularity will then be brought to light of which the High Court at present knows nothing. The whole report before us is in a stereotyped form without any light being thrown upon questions of interest that crop up every now and then in the system of administration.

---

## THE HINDU LAW OF PRIMOGENITURE.

*Brothers by mothers of different classes.*

The *Saptur* case was recently disposed of by the Privy Council on the simple ground that there was a concurrent finding of the Courts in India as regards the custom of the son by the senior wife succeeding to an impartible estate in preference to an elder son by the junior wife. There was another question of considerable importance raised in the case, on which it became unnecessary to the Judicial Committee to pronounce any opinion. It was the subject of the third issue and the High Court of Madras decided (*vide Ramasami Kamaya Naik* v. *Sundara Lingasami Kamaya Naik*, I. L. R., 17 M., 422) that where a Sudra marries a woman of his caste, but of an inferior class as a dagger wife in addition to his wife equal in caste to him, the rule of selection in the matter of succession to an impartible estate is in favour of his son by the latter by reason of the mother being of a higher class.

We propose to examine the correctness of this decision.

The question was raised as a matter of pure law and not as one based upon any custom of the caste or tribe or locality. It virtually amounted to this, *viz.*, that though (1) the father of the plaintiff and the defendant, (2) Nagammal the mother of the plaintiff, and (3) Muthuverammal, the mother of the defendant, were of the same main caste, *viz.*, Sudras, and in fact of the same sub-section, *viz.*, Kambalas; and Nagammal was married to the deceased Zemindar (father of the parties) in accordance with the Kambala caste rites and ceremonies, yet by reason of the defendant's mother being a pure

Kambala, *i.e.*, Thottia Kambala, while Nagammal the plaintiff's mother was found to be a Kolla Kambala (said to denote a mixed caste) and also by reason of the former being born in a Zemindar's family while the latter was born only of an ordinary ryot, the defendant, the son by the former, had priority over the plaintiff, the son by the latter, on the supposed authority of verse 125, chapter IX, Manu. The facts found in connection with the class and rank of Muthuverammal and Nagammal were as follows; The former was the legitimate daughter of parents both of whom were Thottia Kambalas, the father being the younger brother of a Zemindar.

Nagammal, the latter, was the legitimate daughter of parents Muthuverasami Naick and Subbammal, neither of whom was Thottia Kambala, *i.e.*, a pure Kambala, because Muthuverasami was the illegitimate offspring of a pure Kambala, *i.e.*, Thottia Kambala (who was a Zemindar) by a woman of the Vellala caste, another sub-section of the Sudra caste, and Subbammal was the illegitimate daughter of Mulipatti Lingama Naick, a pure Kambala, *i.e.*, Thottia Kambala by one Kamakshi, a woman of the said Vellala caste. In other words, the grandfathers of Nagammal both on the paternal and the maternal side were pure Kambalas, but the grandmothers on both sides were of the *Vellala caste* and therefore the father and the mother of Nagammal were not pure or Thottia Kambalas, being the offspring of Thottia Kambala fathers by women who were not Kambalas but Vellalas. So far as the caste is concerned it is important to bear in mind that among Sudras illegitimacy does not affect caste, and that in fact it is no disqualification for inheritance either, or to succession by primogeniture to an impartible estate. The caste, therefore, of Nagammal's parents is not affected by their being the illegitimate offspring of pure Kambalas by women of the Vellala caste. Kambalas and Vellalas form two of the numerous sub-divisions of the Sudra class or caste. There was no evidence to show which of the two was superior or inferior to the other.

But undoubtedly marriage between a Kambala or a Thottia Kambala and a Vellala would be valid and the offspring legitimate. In other words, marriage between persons belonging to different sub-sections of the Sudra caste is valid and the offspring legitimate.

It need hardly be stated that under the Hindu Law and usage there are only four castes or classes, *viz.*, Brahmins, Kshatriyas,

Vaisyas and Sudras, and that in former times the marriage between a male of one caste with a female not only of his caste but of any of the lower castes was valid and the children of a man by a female of a caste lower than his own were called *Anulomajas.* Though a son by such union was regarded as perfectly legitimate, yet in competition with a son of the same father by a wife of the same caste as himself the share of the former was less than that of the latter.

Marriage of a male of one of the three lower classes with a woman of a caste higher than his was however not recognized. The offspring of such union were illegitimate and referred to as *Prathilomajas* and they had no rights of inheritance. The offspring of the mixed marriages in the *anuloma* form had distinct names assigned to them, such as *Murdhabhishikta, Ambashta, Nishada, Ugra, &c.*

The whole law on this subject, especially with reference to the caste of the offspring of the *anuloma* marriages, will be found discussed in *Brindavana* v. *Radhamani,* I. L. R., 12 M., 72. Marriages in the *anuloma* form are now obsolete and under the present law and usage marriage is valid only as between persons of one and the same main caste, *viz.,* Brahmins, Kshatriyas, Vaisyas and Sudras. Even under the former law, so far as Sudra males were concerned, they could validly marry only in the Sudra caste because they belonged to the lowest class and, as already pointed out, it was not permissible to one to marry a female of a higher caste; Such unions being prohibited and the offspring thereof designated *Prathilomajas* without any rights of inheritance. So far therefore as Sudras are concerned, to which caste the parties to the suit belong, even the ancient law in respect of *anuloma marriage* was altogether inapplicable and the difference in the allotment of shares to sons by wives of different castes was consequently inapplicable to a Sudra because all his wives could only be Sudras. Under the ancient law, in the case of the three regenerate classes, Brahmins, Kshatriyas and Vaisyas even in the case of partible property (and under Hindu law all properties are partible) right of primogeniture was recognized in the sense that among sons born of wives of the same caste an additional share has to be allotted to the eldest by the others. But in the case of sons of a Sudra no such right of primogeniture was recognized and

Manu declares as follows in verse 157, chapter IX, "For a Sudra is ordained a wife of his own caste only (and) no other, those born of her shall have equal shares, even if there be hundred sons."

In the case of *Brindavana* v. *Radhamani*, I. L. R., 12 M., 72, the question was whether the claimant in that case who was illegitimate was the son of a Sudra in which case alone he would have been entitled to succeed as heir. His illegitimacy being admitted the question was whether his father was a Sudra by caste. The paternal grandfather was admittedly a Kshatriya and the paternal grandmother was assumed to be a Sudra. In favour of the claimant it was contended that his father was a Sudra because the paternal grandmother was a Sudra and that he was qualified to inherit as the illegitimate son of a Sudra, though the illegitimate sons of the three regenerate classes are disqualified for inheritance. The decision in the case was however that the claimant's father was not a Sudra by caste and that he was an *Ugra*, an intermediate caste, being the offspring of a Kshatriya by a Sudra woman.

The parties to the *Saptur* case being Sudras and the plaintiff and the defendant being the legitimate sons of a Sudra by different wives the important question is whether in the absence of any custom or usage right of succession by primogeniture to an impartible estate is to be determined with reference to priority of birth or whether it is to be determined with reference to any difference in the social status or considerations as to the castes of the mothers of the plaintiff and the defendant, the mothers admittedly belonging to one and the same leading caste, *viz.*, Sudras, and in fact one and the same main sub-division of Sudras, *viz.*, Kambalas, assuming that they belong to different sub-sections of the main sub-division, the sub-sections being Thottia Kambala and Kolla Kambala or Parivara. The High Court admits that there is no precedent and it relies solely upon what it refers to as the implied authority of verse 125, chapter IX of Manu. This is certainly a decision which, if sound, would lead to most complicated results and lay the seeds for prolific litigation in Hindu society of all castes. Each one of the leading castes, *viz.*, Brahmins, Kshatriyas, Vaisyas and Sudras have in course of time given rise to numerous sub-divisions, and each sub-division in its turn has become split still further into numerous sub-sections. The Kshatriya class and the

Vaisya class are now very limited in numbers and the bulk of the population, excluding of course out-castes or Panchamas, may be divided into Brahmins and Sudras, the latter being by far numerically the stronger. Amongst Brahmins themselves the number of sub-divisions and sub-sections of sub-divisions is sufficiently large, but among Sudras the number of sub-divisions and sub-sections thereof is almost inconceivably large and the same is steadily increasing. From the standpoint of social and caste status, as a general rule, each sub-division considers itself superior to other sub-divisions, and the sub-section of each sub-division superior to the other sub-sections thereof and there is no work of authority to which one could appeal for determining the relative superiority or inferiority of these manifold sub-divisions and sub-sections. The law is now settled that marriage must be between persons belonging to one and the same leading caste, *viz.*, Brahmins, Kshatriyas, Vaisyas and Sudras, and that in the absence of any custom or usage to the contrary the marriage will be valid though the husband and wife belong to different sub-divisions of the same leading caste. The Hindu Law allows of polygamy and he may therefore validly marry two or more wives belonging to different sub-divisions of his caste. While recognising their legal status as wives and the legal status of their offspring as legitimate we are to import nice and controversial distinctions founded on considerations of social status and sub-sections of castes into the determination of their relative and preferential rights of inheritance to the estate of their husbands or fathers as the case may be on the authority of the decision now under appeal; the result will simply be confusion and disaster. No doubt the *Saptur* case relate only to the succession to an impartible estate and verse 125, chapter IX, Manu, on which the decision rests relates only to the right of primogeniture in the sense of giving an extra or larger share, but the principle of the decision will be equally applicable to partible estates also which have to be divided between sons by wives who belong to different sub-divisions of the same caste and on the authority of the analogy furnished by verses 149 to 153, chapter IX of Manu it will have to be divided in unequal shares with reference to the supposed superiority or inferiority of the sub-divisions of the caste to which the mothers of the respective sons belong. Strange to say, while by reason of the supposed superiority of the social status and caste of the defendant's mother

relatively to that of the plaintiff's mother, the impartible estate was decreed in favour of the defendant, the partible property left by the father was equally decreed between the plaintiff and the defendants. As observed by Mr. Justice *Holloway* at page 484 of I. Madras High Court Reports the classes spoken of and referred to by Manu in verse 125 and the verses immediately preceding and following the same are the four classes recognized by Manu, *viz.*, Brahmana, Kshatriya, Vaisya and Sudra and not the infinite sub-divisions of these classes introduced in the progress of time. Referring to the facts of that case he added "I think, therefore, that being a Sudra, the woman was of the same class in the sense of the authority quoted." No doubt on the analogy of the rules prescribed by Manu in the matter of partition and of primogeniture (in the sense already explained) which have now become practically obsolete by reason of marriages being now confined to persons belonging to one and the same leading class or caste, a custom or usage having the force of law might grow up in regard to sons by wives belonging to different sub-divisions of the same caste. But as already pointed out no such custom or usage was set up or relied upon. A custom or usage might grow up limited to succession to an impartible estate, entitling the son by a wife of pure Kambala or Thottia Kambala caste to succeed in preference to a son by a wife of an impure Kambala or Kolla Kambala caste though the latter may be senior in age to the former. The High Court as it seems to us erred in holding that apart from any custom or usage the existence of which was not even alleged, verse 125, chapter IX of Manu already referred to is an authority in favour of the defendant. It is impossible to stretch the said verse and other cognate verses so as to make them applicable to sub-divisions of castes or classes much less to sub-sections of the numerous sub-divisions. The analogies relied upon in the judgment of the High Court of an after-born son excluding an adopted son and of a legitimate son excluding an illegitimate son in the case of Sudras are really no analogies at all to the present case and it is difficult to conceive how they support the position taken by the High Court, that the son by a wife whose social and caste status is superior to that of another wife excludes the son by the latter wife though he is senior in age. The other analogy founded upon *anuloma marriage* is equally beside the point. For admittedly the anuloma marriage was a marriage between a male of one leading

caste or class and a female of a lower leading caste or class. The addition of the dagger in the marriage ceremonial which is found to be the same as that applicable to Kambala marriages cannot constitute the offspring of such a marriage a secondary son as observed by the High Court. If he is a secondary son it is difficult to see how he will be entitled to an equal share with the defendant, the primary son, in respect of partible property. The Judges of the High Court observe that it is difficult to account for the use of the dagger in the marriage ceremonial of Nagammal except on the hypothesis that she was of an inferior rank or class and that the only reasonable explanation is that she was taken and treated as a secondary wife not having the rank of *patni* within the meaning of the text of Manu.

It is impossible to understand what is meant by a secondary wife. No doubt as between wives who belong to different castes precedence will be given to the wife who is of the same caste as the husband. The caste referred to by Manu in connection with such precedence is one of the four leading castes. It is indeed difficult to follow or reconcile the reasoning of the High Court on this question. The High Court observe that although the plaintiff's mother and the defendant's mother were of the Sudra caste they have no difficulty in deciding that the status and rank of the plaintiff's mother was inferior to that of the defendant's mother. They also add that the defendant's mother was the daughter of a Zemindar while the plaintiff's mother was the daughter of an ordinary ryot.

The defendant's mother had no stain of mixed blood while the plaintiff's mother was of the Parivara caste being the descendant of parents of illegitimate origin. The High Court further say "considerably less money was spent upon Nagammal's marriage than in the case of the admitted wives and it was combined with the marriages of two other people of inferior rank of persons who were poor dependants of the Zemindar." "The plaintiff's mother and the other dagger wives as a rule lodged separately and messed separately from other wives." "It is therefore clear to us that the plaintiff's mother was in status and rank inferior to her husband and to the defendant's mother." "The question then arises whether having found the plaintiff's mother and the defendant's mother to be of the same main caste, namely, Sudras, though not of the same

division the difference in their rank or status should make them of a different class within the meaning of sloka 125, chapter IX of Manu. That sloka is to this effect. "As between sons born of wives equal in their class and without any other distinction there can be no seniority in right of the mother. But the seniority ordained by law is according to the birth." "The learned Vakil for the plaintiff maintains that Manu alluded only to caste, as he was there dealing with caste and that any other construction would be meaningless. But the ancient author seems to have been dealing with the equality of wives generally and it is quite possible as in this case that two ladies may be of the same main caste and yet belong to different sub-divisions of that caste and therefore be unequal in class or rank. The strict literal translation of the phrase rendered as 'wives equal in their class' is 'like wives'; which would allow of the wider interpretation that if there were any substantial inequality in the rank or status of the wives they would not be 'like wives.' Within each of the four main divisions of Hindu caste it is notorious, there are many classes or ranks and they are perhaps most numerous in the Sudra caste, and it appears to us that their Lordships of the Privy Council in making use of the words 'caste and class' in their Judgment in *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar,* 14 Moore's Indian Appeals, pages 592 and 594 (Urkad Zemindari case) contemplated inequalities besides those in the main caste only, for otherwise the word 'class' would be superfluous if it was taken to be synonymous with the main caste."

If the position taken by the High Court were at all tenable, one would expect that some one or two convincing reasons would be advanced in favour of it and that the learned Judges would not be driven to the necessity of having recourse to arguments not one of which carries any weight. The very statement of the reasons relied upon shows how dangerous and disastrous would be the consequences that would result from upholding the proposition maintained by the High Court.

They observe that the literal translation of the phrase rendered as "wives equal in their class" is "like wives" which would allow of the wider interpretation that if there were any substantial inequality in the rank or status of the wives they would not be 'like

wives.' One certainly is curious to know what is the rank or status of he wives, the inequality in respect of which would determine the relative rights of sons by such wives. Again referring to verse 125 it was said that the word used was not caste *(jati)* but the expression was "*Sadrisa Strishu*" or wives of the same class, and then "*Aviseshathaha*" without any other distinction and that in verse 122 no allusion to caste or class was made, and referring to verse 125 that what it indicated was probably the inferiority of the class of the wife more than that of the caste and that this justified the use of the expression "caste and rank" in the judgment of the Judicial Committee of the Privy Council in the Urkad case. The endeavour on the part of the High Court to maintain that verse 125 does not necessarily refer to caste but that it refers to status and rank in a much wider sense than mere caste is due to their consciousness that the caste and class which Manu is referring to in Chapter IX is one of the four leading castes or classes and not the infinite subdivisions thereof. The translation of the verse 125 as made by George Bühler, which will be found at page 351 of volume 25 of the Sacred books of the East, is substantially correct and accurate. The literal translation will be the one as therein given omitting the words in the brackets. The words in brackets are inserted by the translator in order to bring out the real meaning of the verse and he has evidently taken the liberty of inserting such words on the authority of commentators. If the said verse does not refer to inequality of caste but to inequality in any respect such as social position, rank, riches, moral qualities, &c., it is too vague to be enforced by Courts in that case like similar verses in Manu and other texts cannot be judicially enforced. Is it not absurd to say that because the defendant's mother is the daughter of a Zemindar while the plaintiff's mother is the daughter of an ordinary ryot, therefore the defendant has priority of inhertance over the plaintiff? Suppose one wife is of a very amiable and good qualities and the other is not, or one is very handsome while the other is the reverse of it, therefore, they are not "like wives" and there is distinction between them; is the son by the amiable or handsome wife therefore to succeed to an impartible estate in preference to the son by the other wife who is not amiable or handsome? Bühler in his translation inserts the words "in caste" after "between sons born of wives equal." Having reference to what precedes and follows and the chapter in

which the verse occurs there can be little doubt that he is right in inserting those words for the purpose of bringing out the real meaning. Bühler evidently inserted the said words "in caste" on the authority of three of the commentators on Manu, *viz.*, Kulluka, Medhathithi and Nandana, all of whom say that the expression "*Sadrisa Strishu*" (like wives) means wives of the same caste. *Vide* Mandlik's Edition of Manu in Sanskrit with the annotations by the various commentators, pages 1178 and 1179. The other expression in the verse "Aviseshatah" "without distinction" according to Kulluka the said commentator means without distinction of caste being explanatory of "*Sadrisa Stri*" "like wives."

The insertion by Bühler of the word "and" before "without" and the words "any other" between the word "without" and "distinction" (*Aviseshatah*) is only the consequence of or explanatory of the wives being equal (in caste). The whole thing is accurately brought out in Bühler's translation of Manu (Trübner's Oriental Series, page 267). It runs as follows:—"If sons are born by mothers of equal (caste) and consequently without any distinction (of caste) the seniority is not according to their mothers (but) the seniority is declared (to be) according to (the time of) birth." This is the best and the most accurate translation of verse 125 and there can be no doubt whatever that it refers to the law as it obtained in the days of Manu when Anuloma marriages or the marriage of a male with a female of a caste inferior to him were recognized and permitted. It only means that the right of primogeniture in favour of the first-born was applicable only to the first-born among sons by wives of the same caste. From this it may not be unreasonable to imply that the first-born cannot claim the right of primogeniture as against an after-born son when his mother is of a caste inferior to that of the mother of the after-born son. If the caste referred to by Manu is as stated by Mr. Justice Holloway in *Panhiya Telaver* v. *Puli Telaver*, I. Madras H. C. R., page 484, one of the four leading castes and not the infinite subdivisions thereof, it is obvious that the Subordinate Judge and the High Court were grievously wrong in applying it to the present case and indeed the said verse is now practically obsolete by reason that no valid marriage can now be contracted between persons both of whom do not belong to one and the same leading caste. The High Court has entirely overlooked an important

rule in the administration of Hindu Law which has been laid down as follows by their Lordships of the Judicial Committee of the Privy Council in 12 Moore's Indian Appeals, page 436. "The duty of an European judge who is under the obligation to administer Hindu Law is not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities as to ascertain whether it has been received by the particular school which governs the district with which he has to deal and has there been sanctioned by usage." This has been reiterated by the same tribunal more than once in subsequent cases. Manu no doubt is a very high authority as lawgiver, but he is so only in the sense that he was the highest and earliest lawgiver as the law stood in his days : but a great deal of that law is now obsolete and different schools of Hindu Law have since sprung up. One has only to read the various chapters of his work to be convinced that no small portion of it is not living law now and notoriously the portion of the law which he deals with in Chapter IX in regard to marriages between different castes and the relative rights of the offspring of such marriages have now become obsolete.

The Mitakshara, Smriti Chandrika, Madhaviya, Viramitrodaya and Sarasvati Vilasa are generally referred to as works of high authority on Hindu Law in Southern India and the best proof that the position taken by the High Court is altogether untenable and speculative is afforded by the absence of any authority directly or indirectly supporting the theory which they deduce impliedly as they say from verse 125 of chapter IX of Manu. They are not able to rely upon any one of the numerous commentators or upon any precedent, judicial or otherwise. Under these circumstances they seek to derive some consolation and support from the reservation which the Judicial Committee of the Privy Council made both in the Urkad case and the Bangaripoliem case as to what the operation of the law and custom of primogeniture would be if there was inequality between the mothers of the rival claimants in respect of their class and rank.

In both these cases the rights of the first-born was upheld in preference to a son subsquently born of a wife married earlier. In neither case did a question arise as to the mothers being unequal in caste, class or rank.

In the former case their Lordships stated as follows at page 592, "But it was contended that where there were sons by different wives the priority of marriage and not of birth was to be regarded. No authority whatever was cited to support this contention, certainly none as regards the sons by any wives after the first. On the contrary there is a good deal of authority pointing to the conclusion that there is no distinction except seniority of birth amongst the sons of wives of the same caste and class." In the latter case their Lordships observed as follows at page 292, "It is not contended that in the present case the wives are not of the same class and their Lordships do not determine what would be the proper rule of succession where the wives are of a different class or caste. The question does not arise." It is not, therefore, right to refer to these two decisions of the Privy Council as lending any the least support to or countenancing the position sought to be maintained by the Subordinate Judge and the High Court on appeal.

The Judicial Committee of the Privy Council as a general rule, especially in regard to questions of Hindu Law turning upon obscure texts, refrain from deciding questions which are not necessary for the decision of the case but content themselves with deciding the question which actually arises. In the Urkad case verses 122 to 125 among others had to be considered and their obscurity commented upon. Attention may also be drawn to a learned note in Bühler's translation of Manu in the footnote to verse 125, chapter IX of Manu from which it will be seen how hopeless it is to reconcile the various verses beginning with 123 and ending with 126 and how discordant the views of the commentators are. The only question is whether the inequality among wives referred to in verse 125 is not simply an equality of caste and not of social status or rank and if so whether the caste of the wives which should be the same is not one of the four leading castes or classes and not the infinite subdivisions thereof. It is hoped that it has been conclusively shown that the verse refers only to distinction of caste and that the caste therein referred to is one of the four leading castes and not the infinite sub-divisions thereof; and that in the absence of any custom or usage which has sprung up in regard to sub-divisions of one and the same caste in analogy to the rule of law in regard to the four leading castes, the High Court ought to have found that the

plaintiff by reason of his being the senior in age was entitled to succeed by primogeniture in preference to the defendant.

That verse 125 is or was not at all applicable to the fourth or the Sudra class or caste is conclusively established by verse 157 already quoted which lays down that for a Sudra is ordained a wife of his own caste only, and no other, and that those born of her shall have equal shares even if there be a hundred sons and that there is therefore no right of primogeniture.

JURISPRUDENCE.

---

## VISVARUPA'S COMMENTARY ON YAJNAVALKYA.

### *Inheritance.*

1. Of the property thus acquired in the various modes previously described :

**"If the father makes a partition, he may separate his sons at his pleasure; he may either dismiss the eldest with the best share or all may be equal sharers."** [1]

When, wishing to enter another order, or intending to make his good sons practise virtue or from pleasure, the father unites his sons with his wealth, then he may give his sons whatever he is pleased to. The meaning is that the father shall not be compelled to make a partition or to make it in a certain manner by his sons at their pleasure. Therefore also he may unite his eldest son with the best share, if he thinks fit; or else he may allot greater and less shares or make them all equal sharers. There it shall be as the father wishes. Thus the rule about the division of the sons is unimpeachable and is independent of affection, good qualities, etc., as in the case of a partition made by an umpire.

2. **"If he makes the shares equal, the wives to whom no stridhana had been given by their husband or father-in-law should also be made equal sharers."** [2]

If equal shares are allotted (by the father), the widows of his sons and grandsons, and his own wives to whom no stridhana had been given by their husband or father-in-law or himself, should be made partakers of their husbands' shares; or those to whom stridhana had not been given should be given portions equal to

[1] Yajnavalkya, II., 114.

[2] *Ibid*, II., 115.

their stridhana. Even if the property be very large, only so much (as 2,000 panas) should be given them, as is laid down in the next "Two thousand panas is the share of a woman"; even if the property be very little, they should be given an equal share. Others hold that an equal share is ordained, because of these being eligible for niyoga (appointment to raise up issue); but that is unsound, as niyoga is impossible. But where niyoga is possible, they can only get the portion necessary for it.

3. Of one who does not care to take the father's property and is able to maintain his family and practise virtue, (Yajnavalkya says):

**"The separation of one who is competent and unwilling to participate, should be effected by giving him some trifle. Of those separated with greater and less shares, the partition made by the father is pronounced legal."** [1]

Something, a mere present, should, to avoid future disputes, be given even to a person who is not desirous of participation, and separation made. If it be asked "Would there not arise disputes if he afterwards says 'I did not take my entire share; so let it be given'", we say there cannot. Why not? because it is laid down (in the latter portion of the text): "For those separated with greater and less shares the partition made by the father is pronounced legal." "Those"; after this, the word 'sons' is understood; the meaning is that that partition alone which is effected by the father among the sons is declared to be lawful.

4. **"After both parents, the sons shall of themselves divide the effects and the debts equally; the daughters shall take what remains of the mother's property after discharging her debts; in their default, the issue."** [2]

The sons shall, after clearing up the debts, take the remaining wealth. The use of the term 'suta' is to indicate the pre-eminence of aurasa sons. Parents] mother and father. After both parents] after their death. They shall divide the paternal wealth after the father's death, and the maternal after the mother's. Even if there exist no wealth, they shall share the debts equally; from equality being stated in the matter of paying up debts, it is inferred that partition also shall be equal. As for the unequal partition laid

[1] Yajnavalkya, II., 116. [2] *Ibid*, II., 117.

down in another Smriti : "The deduction for the eldest is a twentieth (of the whole property) together with the best of all chattels," that should be understood to apply only if the brothers mutually assent to it. Others, thinking that the object of partition is the performance of religious rites, state that the unequal partition laid down in the texts has reference to (the possession or absence of) good qualities. But that should be understood to be unsound, as wealth is one of the (four) objects of human endeavour. As for those texts, however, which lay down the resumption of wealth in case of non-performance of agnihotra, etc., they are intended only as a check to one who commits forbidden acts, and not to establish that the object of wealth is the performance of sacrifices, etc. Therefore unequal partition can be made only if the brothers are so disposed. As for the text of Gautama which propounds the disinherison of persons addicted to vice, even that should be construed as merely admonitory, as the author himself lays it down once as the opinion of some others. This is the gist in brief. Just as the sons are equal sharers in the wealth of the father, so also are the daughters in the property of the mother remaining after her debts have been discharged; but they need not (unlike sons) pay up the debts of their mother, if she leaves no property. Then (is it said) there seems to be no connection between the sons and the mother; no; there is; for in default of daughters, *the issue, i.e.*, the sons (take the mother's wealth). Others, however, take it to mean that in the absence of daughters, their issue (*i.e.*, of the daughters) alone take; but that is unsound from the Vedic hymn : "Na jámayétán vo rikthamāraik." If it is said that it refers to the paternal wealth, we say no; because of the text which lays down the relation of the mother: "Yadi mátaro, etc.," that is, if mothers beget daughters and sons. Vanhi] worthy of being borne, *i.e.*, son. The meaning here is that the son alone is the heir and not the daughter. From this very text regarding one worthy of being borne, it becomes settled that the impotent, etc., who are unworthy of being borne are portionless. Then you may say 'let the property go to the sons alone'; we say that may not be; on account of the text: "The daughters, of the mother." Therefore daughters succeed agreeably to other Smritis and Srutis. Therefore it is established that in default of the daughters, the property certainly goes to the sons.

5. Of persons dwelling together, (Yajnavalkya says):

**"Wealth acquired by oneself without detriment to the paternal estate, as also presents from friends and property received during marriage; these do not belong to the coheirs."** [1]

Whatever was acquired by one (of the coheirs) without injury to the paternal estate, and likewise what was received from friends or at the time of marriage, belong to the acquirer alone and not to the other coheirs also. Maitram] what was received from a friend. Oudváhikam] what was received during marriage. Wealth received from friends, etc., is certainly indivisible, even though acquired to the detriment of the paternal wealth; for it was acquired by the exertions of the acquirer alone. Others, however, are of opinion that only such wealth received from friends, etc., as is obtained without injury to the paternal property is indivisible, on the reasoning regarding the application of general and special laws; that, however, is unsound, as marriage may be accomplished by the use of the common wealth.

6. But, as regards other (sources of increase) than what is received from friends, etc., Yajnavalkya says:

**"But if one improves his property by the use of common stock, an equal division is ordained. Among sons of different fathers, the allotment of shares is according to the fathers."** [2]

The property which is acquired by the use of the common stock is here meant. The meaning is of the property so improved, there is certainly a partition. The particle 'tu' is for the sake of emphasis. Therefore the meaning is that partition must certainly take place. That partition is declared to be equal among all coheirs even though the property was acquired by the physical exertion, etc., of one alone of them. Do all the coparceners share equally? No; the brothers alone: Among sons of different fathers, *i.e.*, of brothers' sons, the allotment of shares is according to the allotments of their (several) fathers. The meaning is that after the brothers divide the property in equal shares amongst themselves, the sons of one of the brothers (who is dead) shall divide the share (of their father) equally amongst themselves. The drift is that the grandsons have a claim on the grandfather's property only through their father; and not by themselves, like their father.

(1) Yajnavalkya, II., 118. (2) *Ibid*, II., 120.

7. Then (it is asked) does ownership accrue from partition, or is partition the result of ownership; it is replied that ownership accrues from partition. Otherwise the text, which enjoins a person having a son to perform sacrifice (ádhána), would be contradicted, because the property is common and it is not possible to give it away. Nor could there be the text of Smritis which enjoins partition at his option; nor is it reasonable to say that the sacrifice should be performed with the son's permission; for one cannot give his consent as soon as he is born. To remove these doubts, Yájnavalkya says:

**"Land acquired by the grandfather, corrody and chattels; in these the ownership of both father and son is equal."**[1]

It is to be understood that the ownership of both father and son in land acquired by the grandfather, in a corrody, *i.e.*, imperishable wealth, and other property, is equal. The meaning is there is no doubt about it. The use of the term 'both' is to suggest the ownership of the unseparated alone. The separate mention of land, etc., should be understood to be due to their being indivisible or immoveable. As for the objection to the impossibility of performing sacrifices, etc., they can be performed with self-acquired wealth, or by instituting a partition of a portion then and there. As for the text of Smriti which lays down partition at his pleasure alone, that is applicable to the owner of self-acquired property. Therefore it is settled that right to partition arises only from possession of ownership.

8. Because partition results from ownership, therefore:

**"A son born, after partition, of a woman of equal caste takes a share; or his share shall be made out of the visible estate corrected for income and expenditure."**

If subsequently to a partition made by the brothers while the mother's menstruation had not ceased, a son is born, then he also certainly has a right to the property. Therefore it has been said that only where there previously exists ownership, there is partition. If, however, right to property were to accrue from partition, then no share will go to the after-born son. But it is here stated that he also has a right to the property. Therefore partition is the result of ownership. To make that clear is the following text begun: "The son born, though after partition, of a woman of equal caste,

---

[1] Yájnavalkya, II., 122. [2] Yájnavalkya, II., 121.

takes a share." The verb '*syát*' should be supplied. Though the share is not specified, it should be understood that he takes the father's share; for Gautama says: "The son born after partition (takes) the paternal wealth." If the father has no property, then the share of the after-born son shall be made out of the visible property of the brothers. This, however, is the distinction: (he shall take a share of such wealth) after it is corrected for income and expenditure. Income] what was acquired by oneself. Expenditure] what was expended out of that wealth. The meaning is that the wealth so corrected for income and expenditure shall be divided (by the brothers) equally with the after-born son.

9. The author explains this:

**"If one recovers property duly descended but which was subsequently taken away, he need not give it to the (rest of the) coheirs: as also wealth acquired by learning."** [1]

He, who being separated, by his own ability makes his own, with the consent of the other coheirs, property regularly descended from father to son but which was not enjoyed by them at the time of partition, need not give it, at a second partition, to the after-born son and the other coheirs; likewise what was acquired by learning. By the particle 'etc.' are denoted presents from friends, etc., which are included in 'corrected for income and expenditure.'

10. Further:

**"Whatever is given by the parents belongs to him alone on whom it was bestowed."** [2]

This rule applies to the share of the after-born son in the property of the coheirs who are alive.

**11. "Of heirs dividing after the death of the father, the mother also takes an equal share."** [3]

The mother who has no stridhana shall also take a share equal to that of the son. The term 'mother' here should be understood to refer to any wife of the father, all his wives being equally related to him.

12. Moreover:

**"Uninitiated brothers should be initiated by brothers already initiated; and sisters (married) by giving them a fourth part."** [4]

Initiation] marriage. That should be performed for uninitiated brothers by brothers already initiated. Property remaining after

---

[1] Yájnavalkya, II., 119. [2] *Ibid*, II., 123. [3] *Ibid*, II., 123. [4] *Ibid*, II., 124.

expenditure incurred on this account should be divided. It is understood from this very text that the marriage should be performed out of the common wealth, and that the wealth acquired at the marriage minus the expenditure belong only to the acquirer. Hence, the brothers should be initiated out of the common property alone; and sisters also (married). If, however, there is no property at all, then the coheirs should each contribute a fourth of his own property for the sister, and the residue shall be divided equally.

13. Thus (has been declared) the equal participation of (brothers) equal in caste. Now, of brothers of different castes:

**"The sons of a Brahmin, in the several castes, have four shares, three, two and one respectively; the sons of a Kshatriya, three, two and one; and the sons of a Vaisya, two and one."** [1]

If a Bráhmin has sons born of wives of each of the four castes, Bráhmini, etc., then the property should be divided into ten, six and three shares; and four, three, two and one shares should be allotted to the sons. Four shares belong to the son by a Bráhmini wife; three to the son by a Kshatriya wife; two to the son by a Vaisya, and one to the son by a Súdra. Similarly it should be concluded that among the sons of a Kshatriya, three shares belong to the son born of a Kshatriya wife, two to the son by a Vaisya and one to the son by a Súdra. If it be urged, that there cannot be sons of a Bráhmin by Súdra wives, as such marriage is prohibited, we say true; the purport is that this rule of partition applies to the case of one who contracts such marriage, in ignorance of the meaning of the Smritis.

14. If the coheirs have unequal allotments, then:

**"Effects which have been withheld from one coheir by another, and which are discovered after partition, they shall divide again in equal shares. This is a settled rule."** [2]

The use of the expression 'settled rule' is to assert that there shall certainly be an equal partition.

15. This rule of partition is with reference to aurasa sons. In default of aurasa sons,

**"The son begotten by a sonless man on another's wife, under legal appointment, is the heir and giver of the pinda to both."** [3]

If it be urged that this rule does not apply to the Bráhmins, as niyoga is prohibited among them, but applies to the Kshatriyas

---

[1] Yájnavalkya, II., 125, [2] *Ibid*, II., 126. [3] *Ibid*, II., 127.

and others, (we say) no; there is no prohibition of niyoga in the case of Bráhmins but only in the case of Bráhminis; therefore the son begotten by another cannot belong to the Bráhmin. But a Bráhmin may well beget a son on women of Kshatriya caste, etc.; therefore the rule is unobjectionable where there is no aurasa son.

16. Of what description is the aurasa son? It is stated:

**"The aurasa is the son procreated on the lawful wedded wife. Equal to him is the son of the appointed daughter. The kshetraja is one begotten on the wife by a sagotra or by some other."** [1]

Lawful wedded wife] a wife of equal caste espoused according to the Bráhma and other forms of marriage. The aurasa is the son begotten by himself on her. The expression 'equal to him' is to suggest the superiority (of the son of the appointed daughter) to the kshetraja and the rest. The nature of the appointed daughter should be learnt from other Smritis. The kshetraja is a son procreated on one's wife by his sagotra or any other by legal appointment.

17. Even if appointment be not made

**"The gudhotpanna is a son secretly produced in the house. The kanina is a son born of an unmarried woman.[1] He is considered as the son of his maternal grandsire."** [2]

These two sons should be known to belong to their mother's caste, since their father is not known.

18. So also:

**"A paunarbhava is the son begotten on a woman whose first marriage had not been consummated or on one who had been deflowered (before marriage). He whom his father or mother gives for adoption shall be considered to be the dattaka."** [3]

A paunarbhava is one begotten on a woman whose husband had died and whose first marriage had not been consummated, or on a deflowered woman, who, having been living with others re-enters her husband's family. A dattaka is one given away by his parents, *i.e.*, father or mother with his permission. So also Vasishtha says: "Let not a woman give or take a son without her husband's consent." Thus a dattaka is one who is given away by his father and mother according to law.

S. Sitarama Sastri.

*(To be continued)*

[1] Yajnavalkya, II., 128. [2] *Ibid*, II., 129. [3] *Ibid*, II., 130.

# NOTES OF INDIAN CASES.

**Bakar Sajjad v. Udit Narain Singh,** I. L. R., 21 A., 361. We are obliged to the learned Judges of the Allahabad Court for a full exposition of the Privy Council Case of *Rameswar Koer* v. *Mahomed Mehdi Hossein Khan*, I. L. R., 26 C., 39. We were unable to see from the report of that case that the Privy Council dealt with any question beyond the date fixed for realization in the decree. The whole record of that case was sent for by the Allahabad Court and it appears now clear that while the High Court awarded the contract rate of interest from the date of plaint up to the date fixed for realization, namely, six months from the date of the decree, the High Court awarded 4 per-cent. after the later date up to the date of actual realization. It is true, no question arose before the Privy Council as regards the award of interest beyond the date fixed for realization; but there is no doubt that their Lordships approved of the award made by the High Court when they said that the sections of the Transfer of Property Act seem clearly enough to direct accounts allowing the rate of interest provided by the mortgage up to the date of realization, not, be it noted, up to the date fixed for realization. The meaning of the Privy Council is further clear when referring to the award of the lower rate of interest after the date fixed for realization, they said "if the High Court has allowed something less the mortgagee makes no complaint. The mortgagor cannot complain if he is made to pay no more than he contracted to pay." It follows from the above quotation that in mortgage decrees the Court should provide future interest at the rate stipulated up to the actual date of realization; and not merely up to the date fixed for it in the decree. This exposition of the Privy Council decision with the help of the printed record does away with the conflict that previously existed between the several High Courts.

**Robert Fischer v The Secretary of State for India in Council,** I. L. R., 22 M., 270. It is important to note what the Privy Council has pointed in this case that S. 42 of the Specific Relief Act does not exhaust all suits for declaration. It is not necessary that the plaintiff seeking for a declaration that the order of Government directing a cancellation of separate registry is void should ask for any separate consequential relief. If the declaration by the Court is not obeyed by the Collector, the party would be at liberty to apply to the Court for further direction. The observation of the Privy Council that the arm of the Court is long enough to reach the offender is liable to the misconstruction that

every declaratory decree is capable of enforcement by execution. We do not suppose that the Privy Council intended any such meaning. The order of Government had the effect of cancelling the registry and when that order is declared void, it means that the cancellation is set aside. The declaration and the so-called consequential relief of restoring the original separate registry are in the view of the Privy Council practically the same.

**Tirumal Rao v. Syed Destaghiri Miyah,** I. L. R., 22 M., 286. A question of importance is raised in this case whether S. 310-A is applicable to sales under mortgage decrees. If S. 310-A is held not to be applicable, upon the same reasoning all the provisions in the chapter relating to sales in execution must also be held to be inapplicable; and we can see no warrant for this conclusion. The language of the sections beginning with S. 286 is sufficiently wide to cover sales under mortgage decrees. If S. 310-A were not applicable, Ss. 311 and 312 cannot also be applicable and this result would never have been intended. In *Kedar Nath Rant* v. *Kali Churn Ram*, I. L. R., 25 C., 703, the Calcutta High Court relies upon S. 104 of the Transfer of Property Act, so that unless there are rules made by the High Court making S. 310-A applicable no question can arise of its applicability. We do not suppose that the power conferred by S. 104 necessarily implies that the provisions of the Code with regard to sales are inapplicable. The power may well be exercised in the framing of rules supplemental to the provisions of the Code. Assuming that where rules are made under S. 104 excluding the operation of S. 310-A, that section is inapplicable, there is no reason why it should not apply where no such rules have been made.

**Sinaya Pillai v. Munisami Ayyan,** I. L. R., 22 M., 289. We doubt whether the conclusion arrived at by the Court follows from the reasoning that a mortgage without the sanction of the Court made by a guardian appointed under the Guardian and Wards Act is voidable by the minor. In a suit upon the mortgage, the minor's guardian objects to the validity on the ground of want of sanction. It may well be when the minor's estate has benefited by the mortgage money, the mortgage cannot be avoided without the return of the benefit. The mortgagee would, therefore, be entitled to recover the money from the minor's estate. But that is very different from enforcing the mortgage. The decree of the Subordinate Judge in this case enforced the mortgage according to its terms with reference to interest, etc. All that the plaintiff would be entitled to would be the return of the money without the interest stipulated from the minor's property generally and not as mortgage

money by sale of any specific property. The High Court appears to us to be wrong in affirming his decree.

**Gowdu Magata** *v.* **Gowdu Bhagawan,** I. L. R., 22 M., 299. We do not think there is any analogy between the provisions of S. 523 and those of S. 525 of the Code. The application is in both cases registered as a suit and the refusal to file the agreement is a formal expression of an adjudication upon a right claimed and is, therefore, a decree. As regards S. 525 there may be a decree in the same way, but S. 526 read with S. 522 prohibits an appeal from the decree.

**Rama Sastri** *v.* **Narasimha Ayyan,** I. L. R., 22 M., 30. We have no doubt that the assignment of a mortgage, namely, a right to recover the money is a transfer of an actionable claim. The judgment makes no reference to the authorities, but we think the reasoning of the Allahabad High Court in the Full Bench case, is conclusive on the matter. *Fateh Chand* v. *Muhammad Baksh*, I. L. R., 16 A., 259. See however *Mahomed Yusuf* v. *Abdur Rahim Bepari.*, I. L. R., 26 C., 839, *Muchiram Barik* v. *Ishan Chunder Chuckerbutti*, I. L. R., 21 C., 569 and *Russick Lall Ral* v. *Romanath Sen*, 792.

**Dharmapuram Pandara Sannadhi** *v.* **Vira Pandiyam Pillai,** I. L. R., 22 M., 302. It is much to be regretted that thiscase had to be decided upon the texts of the Hindu Law. We do not question the correctness of the opinion that according to the texts a Sudra cannot enter the order of *sanyasin;* but we must wilfully shut our eyes to the facts if we do not recognize that Sudras do enter the order and are treated as *sanyasins* everywhere. It is competent to anybody to renounce the world, be he a Brahmin or a Sudra, and that is all that a *sanyasam* implies. If a plea of custom had been raised the Court would have been bound to come to the conclusion that there are Sudra ascetics all over the country and that the rule of succession is similar to the rule of succession laid down for the orthodox *sanyasins* as recognized by the texts.

**Rangammal** *v.* **Echammal,** I. L. R., 22 M., 305. We are glad that the High Court has seen its way to hold that a son's widow where a husband had left no property is entitled to maintenance out of the self-acquired property of the father-in-law in the hands of his heirs. We have no doubt that this was the true Hindu Law; and it is a source of satisfaction that the right rule has been laid down by the Court. Whatever anomalies there may be in the Hindu Law a right understanding of its principles upon a liberal interpretation of the Law makes in favor of modern ideas of justice.

## SUMMARY OF RECENT CASES.

### Mahomedally Moola Tyabji *v.* John Campbell.

Where a tenant, under a monthly tenancy, is obliged to vacate the premises under an order from a Plague Authority appointed under the rules framed under the Epidemic Diseases Act (III. of 1897) he is not thereby absolved from the liability to pay the rent for the remaining portion of the month and to give the usual month's notice to quit.—1, *Bom. Law Reporter*, *p.* 739.

*Hindu Law—Adoption—Datta Homa—Regenerate classes—Adoption of a brother's son.*

### Valubai *kom* Kashinath Abaji Joshi *v.* Govind Kashinath Joshi.

In the Bombay Presidency the *Datta Homa* ceremony is not essential to the validity of the adoption of a brother's son, even though the parties be members of one of the three regenerate classes.—1, *Bom. L. R.*, *p.* 739.

### Laxman Darku *v.* Narayen Laxman Khatik.

A minor sued for partition and obtained a decree which ordered that he should receive a certain amount of income every year during his minority and that when he became a major he should recover his share of the land. The minor then died and his widow presented a *darkhast* to execute the decree.

*Held*, (1) that the effect of the decree was clearly to make the minor a divided member of the family;

(2) that the heirs of the minor could, in the execution proceedings, recover the arrears of the allowance up to the death of the minor;

(3) that his heirs could not claim in the execution proceedings either the share or the subsequent allowance as awarded in the decree, which would be recoverable only by a separate suit.—1, *Bom. L. R.*, *p.* 777.

*Hindu Law—Purchaser of a property from one co-parcener—Suit by the purchaser—Partial partition not allowable.*

### Shivmurtepp *bin* Bashetappa Katti *v.* Virappa *bin* Shivlingappa Kavdi.

The plaintiffs having bought at a Court sale the share of defendant 1 in a warehouse, which was held by him jointly with his brother

defendant 2, brought a suit to obtain half a share of it partitioned off and given to them. Defendant 2 claimed that there should be a general partition made of all the joint property and that his share in it should be ascertained and given to him. The Lower Courts held that there was no necessity for a general partition as it was clear that a half-share of the warehouse in suit would fall to defendant 1 if a general partition were made:—

*Held*, (1) that the decision of the Lower Courts could be upheld only where none of the co-parceners, but the purchaser only wished a partition; and the decision would not hold good where a general partition is desired and asked for by a co-parcener.

(2) that where the members of a joint family themselves desired a general partition that prayer could not be refused.

*Per Parsons*, J.—It is the right of every defendant in a partition suit to ask to have his own share divided off and given to him and the fact that the partition suit has been brought by a purchaser cannot alter or annul that right.

A defendant claiming a share on partition is, *qua* that claim, in the position of a plaintiff and could be called on to pay Court-fees on the value of his claim.

*Per Ranade*, J.—A suit will not lie for the division of any single property, and the only remedy is by general partition. The exceptions recognized to this rule are—

(1) where any portion of the joint property is not in the possession of any of the co-parceners by reason of its being in mortgage with third parties, in which case such mortgaged property, if not available for immediate partition, may be excluded from the partition suit; and

(2) where any property is within the jurisdiction of a foreign court.—1, *Bom. L. R.*, *p.* 620.

---

*Civil Procedure Code* (*Act XIV. of* 1882), *Sec.* 316—*Sale in execution —Sale absolute—Death of purchaser—Grant of certificate to his representatives.*

## Vinayek Narayen *v.* Dattatraya Krishna Datar.

When a sale in execution has become absolute, the Court can, under S. 316 of the Code of Civil Procedure, grant the certificate prescribed therein to the representative of a deceased purchaser.—1, *Bom. L. R.*, *p.* 645.

*Minor—Guardian—Loan of money to guardian—Suit to recover money from guardian, framed on a breach of warranty—Warranty based on a representation—Representation on a point of law.*

## Shet Manibhai Premabhai *v.* Bai Shri Rupaliba.

The plaintiff lent a sum of money to defendant, the guardian of her minor son. Finding that his claim against the defendant on the original loan would be time-barred, the plaintiff formulated his claim as one for damages arising out a breach of warranty:—

*Held*, (1) that as the plaintiff knew that the son was an infant and that any representation that the defendant was her infant son's duly authorized agent was incorrect, no warranty such as would support a suit could arise out of such a representation;

(2) that even if it be concluded that there was a representation as to her power to bind the estate, it was one on a point of law and thus incapable of supporting a suit.—1, *Bom. L. R., p.* 646.

---

*Easement—Right of way—Dominant heritage used for agricultural purposes—Subsequently turned into a timber depôt—Right of way cannot be claimed for the altered heritage—Imposing a greater burden on the servient tenement.*

## Desai Bhaoorai Ranchhodrai *v.* Desai Chunilal Dahyabhai and others.

The plaintiff and defendants were owners of adjacent fields, and one mode of approaching the defendants' field was by a way which passed through plaintiff's field. The defendants' field was used for agricultural purposes, but lately they converted their field into a timber yard, and the dispute between the parties was whether the defendants could claim to use the way for the new purpose:—

*Held*, that the defendants could not, by merely altering the dominant heritage, substantively increase the easement.

"The use" must be the reasonable use for the purpose of the land in the condition in which it was while the user took place, so that if the user is for a field devoted to agricultural purposes, the right cannot be claimed for a timber depôt into which the field was converted.—1, *Bom. L. R., p.* 658.

---

*Civil Procedure Code (Act XIV of 1882), S. 295—Assets realised by "sale or otherwise," meaning of—Receiver, appointment of Equitable execution—Rateable distribution—Rents realised by Receiver.*

## W. R. Fink *v.* Moharaj Bahadur Sing.

Rents of property under attachment realised by a Receiver, appointed at the instance of a decree-holder, are assets realised by "sale or otherwise" in execution of a decree within the meaning of sec. 295, C. P. C.

Assets realised by the appointment of a Receiver after decree, are assets realized by a process of execution provided for by the Code.

The appointment of a Receiver at the instance of a judgment-creditor is equitable execution.

*Anglo-Italian Bank* v. *Davies* (5) referred to.

Creditors who had applied for execution of their decrees prior to the realisation of the rents by the Receiver were alone entitled to participate under S. 295 and not those who had subsequently obtained attachment.—*C. Weekly Notes, p.* 27.

---

*Receipt, what is a—Penalty for unstamped receipts—Liability of Principal.*

## Attorney-General *v.* Carlton Bank [1899], 2 Q. B., 158.

A solicitor whose services were specially engaged by a bank and who was bound to devote his whole time to its legal business sued for and recovered money due to it in the performance of his duties as such servant of the bank. From time to time he handed over the moneys so recovered to the Secretary or Cashier of the bank and obtained their initials against the entries of moneys recovered as evidence of payment over to the bank. These initials were sometimes preceded by the words "received" or "entered" and sometimes they stood alone.

On an information by the Attorney-General on behalf of the Government, three questions were raised, (1) whether these records, were receipts and so liable to stamp duty whenever the record referred to the payment of more than £2, (2) whether the bank was liable to pay the penalty, (3) and whether the presence or absence of the preceding words made any difference.

On the first question Lord *Russel*, C.J. held that notwithstanding that there might be some difference between the engagement of an independent solicitor and the employment of a solicitor as the servant of the bank under a special agreement, the difference did not touch the

question of construction as to whether these records given to the solicitor were receipts and that the object of the record being admittedly to acknowledge and evidence the payment of the money as between the bank and the solicitor, the documents constituted receipts within the meaning of the Stamp Act and were therefore liable to stamp duty as such.

On the next point he held that the Company being a limited Company could act only through its officers and that the finding of the jury being that the Secretary and the Cashier of the bank had its authority to receive the money, it was really the bank that received the money and issued the receipts and this, notwithstanding that the intention of the officers was not to act for the bank but to protect themselves against each other.

On the last point he decided that the object in every case being the acknowledgment of receipt, it did not matter what words were used in expressing it or even that no words were used.

[There is no rule that Revenue Acts should be construed liberally in favour of the subject. In all cases the plain and the only rule of construction is to ascertain the intention of the Legislature and give effect to it irrespective of the hardship or inconvenience that may arise from its application.]

*Bills of Exchange Act, S. 82—Crossed cheque—Receipt for customer—Conversion—Money had and received.*

## G. W. Ry. Company *v.* The London and County Banking Co., [1899], 2 Q. B., 172.

In this case a rate collector for some District Councils, on the false representation that a rate had been made, obtained from the plaintiff in payment thereof a crossed cheque marked "not negotiable" payable by a London Bank. The defendant company who were, for over fifteen years, in the habit of cashing a considerable number of cheques presented by the rate collector, took the crossed cheque and paid him its amount in money which he immediately disposed of to his own use. They afterwards sent the cheque to their Branch Office in London and obtained payment from the London Bank. The plaintiff now brought this action against the defendants for the value of the cheque either as money had and received to the plaintiff's use or as damages for conversion of the cheque,

The question was whether the defendants were protected by the Bills of Exchange Act, S. 82, which provides that a banker who in good faith and without negligence receives payment for a customer of a crossed cheque is not liable to the true owner, should the customer happen to have a defective title or even none at all. The determination of this question depended upon whether the rate collector could be considered a customer of the bank and whether the payment made to the defendants by the London Bank was for such customer.

*Bigham*, J., held that the long course of habit in the cashing of the cheques was sufficient to constitute him a customer, even though he had no standing account nor any passbook or anything of the kind, that the prior payment of the value of the cheque to the collector was only an advance of money in anticipation of collection and did not constitute a purchase of the cheque so as to prevent the subsequent receipt of money from the London Bank from being a receipt for a customer and that the defendants were therefore entitled to the protection afforded by S. 82 of the Act.

[The question whether a person is a customer or no is one of fact to be left to the jury in cases triable with a jury.]

*Conversion—Estoppel—Liability of Warehousemen.*

## Union Credit Bank *v.* Mersey Docks and Harbours Board, &c., &c., [1899], 2 Q. B. 205.

These are three connected cases. In the first case a person who had pledged to the plaintiffs as security for the repayment of a loan eighteen hogsheads of tobacco then in the custody of the defendants' warehousemen, paid the money due upon one hogshead of tobacco, obtained the signature of the plaintiffs to a delivery order with the column relating to quantity left blank on the pretence that some information had to be obtained before the column could be filled up and took delivery of all the hogsheads by fraudulently filling in the blank the words "eighteen hogsheads." In the next case one of two consignments which were pledged to the plaintiffs was redeemed and a duly drawn up delivery order for the same was altered by the insertion of the description of the other consignment in the unwritten space left above the plaintiffs' signature and the defendants were thereby induced to deliver both the consignments. In the last case the person who so obtained possession of the consignment pledged a portion of them to a bank in order to secure an advance made by them. Subsequently the

money was paid and the warrant for the goods which had been deposited with them was returned to the pledgor. All this was done by the pledgee in ignorance of the fraud of the pledgor in obtaining possession of the consignments.

The question in the first two cases was whether the warehousemen were liable, and in the third whether the innocent pledgee was liable, as for conversion of goods.

In the first case *Bigham*, J., held that whatever might have been the intention of the plaintiffs and their explanation of the failure to duly fill up the delivery order, yet having omitted to perform the duty they owed to the defendants of clearly indicating the quantity of the goods to be delivered and directly assisted in the perpetration of the fraud by putting it within the reach of the pledgor to forge the delivery order and thus deceive the defendants, the plaintiffs were estopped from now showing that they did not authorise the insertion of more than one hogshead of tobacco.

In the second case it was contended that it was the duty of the plaintiffs to see that no space was left above their signature and that the space, if any, was crossed by lines so that there may be no scope for forgery and that having helped to mislead the defendants by their failure to do so, the plaintiffs were not entitled to recover. But the Judge held that seeing that the delivery order was in the form in which many such orders usually were when signed by men of business, it could not be said that there was any carelessness on the plaintiffs' part, because they did not anticipate the fraud and provide against it, that even if there was any carelessness, the plaintiffs owed no duty to the defendants to take such extreme precautions and moreover the negligence was not the proximate cause of the fraud and that the defendants were therefore liable to make good the loss of the plaintiffs.

In the last case it was held that the pledgee having had nothing to do with the goods themselves and having on receipt of his money returned the warrant for the goods in good faith and without notice of the fraud practised in obtaining possession of the consignments, he was not liable any more than an ordinary carrier who takes possession of stolen goods from a thief and at the end of his journey receives his charge and returns the goods without any knowledge of the theft.

---

*Railway Company—Fencing—Owner or occupier of adjoining lands—Highway.*

**Luscombe v. Great Western Railway,** [1899], 2 Q. B., 313.

Where a licensee of the owner of a wood depastured his cattle into it and some of them strayed along a highway into the adjoining

railroad and were killed by a passing train it was held by the Court of the Queen's Bench (*Darling* and *Channell*, JJ.) that where the cattle not merely used the highway as a highway for the purpose of passing and repassing from one place to another but strayed about it without a guide they were not the cattle of owners and occupiers within the meaning of S. 68 of the Railway Clauses Consolidation Act even though they were there with the permission of the owner and that the Railway Company were not bound to fence against such cattle. *Manchester, &c., Railway Company* v. *Wallis*, 14 C. B., 213, referred to.

*Employer and Workman—Employer's negligence—Defective appliances—Knowledge of Workmen—Agreement to undertake the risk—Liability of Employer.*

**Williams** *v.* **Birmingham Battery & Metal Co.** [1899], 2 Q. B. 338 C. A.

The simple question in this case was whether the employer who had neglected to provide proper appliances could evade liability for the death of a workman by reason of such negligence by showing that the deceased was well aware of the risk and must be presumed to have agreed to undertake the risk. It was held by the Court of Appeal that since the case of *Smith* v. *Baker* [1891] A. C. 325 it was settled law that the knowledge of the risk by itself did not necessarily involve any acceptance of the risk and that there being no finding by the jury that there was any implied or express undertaking to accept the risk, the defendants were bound to compensate the widow for her husband's death.

*Execution—Right of retainer of debt—Administration order—Payment of assets to Official Receiver—Ignorance of right.*

**In re Rhoades, Ex parte Rhoades,** [1899], 2 Q. B. 347 C. A.

In affirming the decision of *Wright*, J., in [1899], 1 Q. B. 905 (*see ante* p. 288), the Court of Appeal consisting of the Master of the Rolls Sir *F. H. Jeune*, *P.* and *Romer*, LJ., held that the executor need not assert his right to retain his debt before there was any necessity to do so, that though a creditor with the right to retain the debt had not all the rights of a secured creditor (*Lee* v. *Nuttall*, 12 Ch. D., 61) he had a right as against creditors of equal grade to pay himself fully out of the legal assets in his hands and this right was in no way affected by an administration order in Bankruptcy (*Hasluck* v. *Clark* [1899], 1 Q. B. 699 and *In re Williams*, 8 *Morrel* 65), that though generally ignorance

of law would not be relieved against, *Ex parte James* [1874], L. R. 9 Ch. 609, and *Ex parte Simmonds* [1885], 16 Q. B. D. 308 showed that mistakes of the kind could be set right so long as the money was in the hands of the officer of the Court and that the proof in bankruptcy withdrawn on discovery of mistake and before adjudication could not deprive the executrix of the right to claim the money back.

*Liability of Employer—Independent Contractor—Dangerous work on Public Roads.*

## Holliday v. National Telephone Company

[1899], 2 Q. B. 392 C. A.

A telephone company laying telephone wires under the road engaged a plumber to connect the tubes. The company through their foreman supervised his work and a workman of theirs was helping him in his work. In order to get the flare necessary for connecting the tubes the plumber dipped a benzoline lamp into melted solder and the safety valve not being in working order the lamp exploded and a passer-by was injured. The question was whether the company were liable for the injury. The Court of Appeal (*Earl of Halsbury*, L. C., *A. L. Smith* and *Vaughan Williams*, L.JJ.) in reversal of the decision of the Division Bench held that upon the evidence in the case the injury was caused not by the independent contractor alone (if he was at all an independent contractor) but by him jointly with the defendant's workman under circumstances which would make them both liable for the negligence such as resulted in the injury to the plaintiff in the case and that even if he was an independent contractor, since the cases of *Hughes* v. *Percival*, 8 App. Cas. (H. L.) and *Black* v. *Christchurch Finance Co.* [1894] A. C. 48 P. C. "it is difficult for a person engaged in the execution of dangerous works near a highway to avoid liability by saying that he has employed an independent contractor, because it is the duty of a person who is causing such works to be executed to see that they are properly carried out so as not to occasion any damage to persons passing by on the highway."

*Practice—Discovery—Affidavit of Documents, form of—"Containing nothing impeaching the case of the defendants."*

## Attorney-General v. Mayor, Alderman, and citizens of New-castle-upon-Tyne and Hill Motum

[1899], 2 Q. B. 478 C. A.

This was an information by the Attorney-General against the defendant corporation claiming a declaration of Her Majesty's right to

the foreshore and bed as far as midstream of the river Tyne to the exclusion of the defendants. In answer to one of the interrogatories filed for the examination of the defendants as to the documents in their control or possession, they admitted being in possession of certain documents and said that neither they nor any others in their behalf had any other papers relating to the matters in question. On the application of the informant for further discovery the Divisional Court ordered further discovery by affidavit and production for inspection of the informant, of all documents "except such as the defendant should by his affidavit identify and state to relate solely to the case of the defendant corporation *and to contain nothing impeaching the case of the defendant corporation or* supporting the case of the informant, etc." Against this order the defendants appealed. The question on appeal was whether it was right to require the defendants not simply to state that the documents of which exemption from inspection was claimed related solely to the case of the defendants but to state further that they contained nothing impeaching the case of the defendants or supporting that of the informant. It was contended for the respondents that the order of the Division Court was right, that the case of *Morris* v. *Edwards,* 15 App. Cas. 309 was one in ejectment and stood on a different footing as in such cases the plaintiff had to succeed on the strength of his own title not on the weakness of his adversary's, and that as in this case the presumption was that the Crown had a right to the foreshore unless it had granted it to anybody and any document impeaching the defendant's title must necessarily support the title of the Crown, the statement that the documents did not contain anything to impeach the defendant's title was rightly required in support of the defendant's claim of privilege.

The Court of Appeal (*A. L. Smith* and *Vaughan Williams,* L.JJ.) held that though the case of *Morris* v. *Edwards* was framed in ejectment, the judgments not only did not rely upon it but based the matter on broad considerations which were applicable to all suits of whatever nature they might be and the words "*impeaching the case of the defendants or*" should be struck out. They also said that the word to be used is not "title" but "case" so that the affidavit should declare that the documents related solely to the "case" (not "title") of the defendants and contained nothing relating to the "case" (instead of "title") of the informant.

(*Quære* per *Vaughan Williams,* L.J., whether in cases in which documents impeaching one's title, at the same time go to support the affirmative title of the adversary inspection should not be given.)

*Practice—Patent action—Shorthand notes—Payment by solicitor—Solicitor's right to recover from client.*

**Osmond v. Mutual Cycle and Manufacturing Supply Co., [1899], 2 Q. B. 488 C. A.**

The question in this appeal was whether a solicitor was entitled to recover from his client money paid by him for taking shorthand notes in a patent action. At the beginning of the trial the judge asked whether a shorthand note was to be taken. After some discussion the solicitors on both sides agreed with the concurrence of the judge that a shorthand note was to be taken and should constitute the record in the cause and that the parties should share the expense of having it taken. The solicitor paid a moiety of the costs and now sought to recover it from his clients. On the clients' objection both the master and the judge in chambers refused to include this item in the taxation of costs. The objection was based upon the ruling in *In re Blyth and Fanshawe*, 10 Q. B. D. 207, that where the cost about to be incurred is unusual and may not be allowed between party and party, the solicitor should inform, and take the permission of, his client beforehand or he will not be entitled to charge his client with the cost so incurred.

The Court of Appeal (*A. L. Smith* and *Vaughan Williams*, L.JJ.) held that the solicitor was entitled to charge his client with this item of costs.

*A. L. Smith*, L.J., said that in patent actions which usually involve very complicated and scientific details the cost of taking shorthand notes was not at all unusual and that the clear effect of the agreement between the parties with the sanction of the Court was to make the costs of taking shorthand notes costs in the cause and that therefore the ruling quoted had no application to the case.

*Vaughan Williams*, L.J., added that apart from the consideration that the cost was not unusual and was chargeable between party and party, there was this additional fact that the shorthand notes constituted the authentic record in the case and were, as such used by the judge and that the solicitor was entitled to charge his client with any costs incurred by him in supplying authentic records for the use of the judge.

---

*Employer and Workmen—Injury—Disabled to earn 'full wages at work at which employed'—Workmen's Compensation Act, S. 1, sub-s. 2 (a), construction of:*

**Chandler v. Smith [1899], 2 Q. B. 506 C. A.**

A foreman in a factory who in addition to his primary duty of supervision also used to set up and adjust machines, was injured in the course of adjusting a machine. He was disabled to do the work there-

after but continued to attend the factory and do his work of supervision and received his usual wages of £3 a week. The question was whether the owners of the factory were liable to pay any compensation to him. The section of the Workman's Compensation Act which provides for compensation to injured workmen contains the proviso that "the employer shall not be liable under this Act in respect of injury which does not disable the workmen for a period of at least two weeks from earning full wages at the work at which he was employed."

The Court of Appeal (*A. L. Smith*, *Rigby* and *Vaughan Williams*, L.JJ.) held that although the foreman did not absent himself for two weeks and although he continued to receive his usual wages, it could not be said that he was not disabled from earning full wages for at least two weeks *at the work at which he was employed* and that his wage-earning capacity as foreman in case he should leave this factory and go to a new one having decreased, he was entitled to a declaration that the employer should be liable whenever his wages should diminish *by reason of this accident*, the amount of compensation and the time during which it should be payable being left to future determination.

## JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks receipt of the following publications :—

The Law Students Journal from January to November 1899, (*in exchange*).

The Law Students Helper for November 1899, (*in exchange*).

The American Lawyer for November 1899, (*in exchange*).

Case and Comment.

The Quarterly Advance sheets of the yearly Digest, published by the Lawyers' Co-operative Publishing Society (*in exchange*).

The Lawyer, (*in exchange*).

Sind Sadar Court Reports, Vol. 1., No. 4 (*in exchange*).

The Bombay Law Reporter for October and November (*in exchange*).

The Albany Law Journal for October and November (*in exchange*).

The Calcutta Weekly Notes for October and November (*in exchange*).

The Allahabad Weekly Notes for October and November (*in exchange*).

The Green Bag for October and November (*in exchange*).

The Canadian Law Times for October and November (*in exchange*).

The Educational Review for October and November (*in exchange*).

The Canada Law Journal for October and November (*in exchange*).

The Kathiawar Law Reports for November (*in exchange*).

*The largest incomes at the bar* :—According to a London weekly, the incomes of the 150 practising Queen's Counsel scarcely average $5,000 per year. Mr. Balfour Browne is said to enjoy the largest—£30,000 a year. Samuel Pope, Mr. Cripps, Mr. Pember and Sir Edward Clarke make about £15,000 each.—*The American Lawyer.*

***

*Marriage by one having sexual disease*:—The Michigan Legislature has recently passed a law forbidding the marriage of any person suffering from infectious or transmissible sexual disease. The law states that any one so diseased who may marry shall be guilty of felony punishable by a fine of not less than $500 or more than $1,000, or imprisoned for a term not exceeding five years, or by both fine and imprisonment.—*The American Lawyer.*

***

*Are patients to be kept alive at all hazards* :—Judge Simeon E. Baldwin, of New Haven, president of the American Science Association, in a much discussed address recently delivered before that body, took occasion to censure the practice of physicians in keeping the patient alive at all hazards for the longest time possible and irrespective of the amount of suffering involved. In the course of his remarks, he observed:

"In civilized nations, and particularly of late years, it has become the pride of many in the medical profession to prolong such lives at any cost, discomfort or pain to the sufferer, or of suspense or exhaustion to his family.

"The patient has come to a point where he cannot bear the thought of eating. The throat declines to swallow what the stomach is no longer able to digest. He craves nothing but to be alone. A few hours, and nature will come to his release. She is already, perhaps, fast throwing him into that happy unconsciousness of pain which we call lethargy. The vital forces have been spent. The main spring is broken and the watch has run down. It can be made to tick feebly for a minute or two by shaking it hard enough; but *cui bono*? Only another main spring can mend it. Only another soul, another world, can give value to this human life that is ready to flicker out because it is worn out.

"The family ask the doctor if there is no hope and he responds with some sharp stimulant; some hypodermic injection; some transfusion or infusion to fill out for a few hours the bloodless veins; some device for bringing oxygen into the congested lungs that cannot breathe the vital

air, some cunning way of stimulating some other organ to do the stomach's work. The sufferer wakes to pain, and gasps back to a few more days of life.

"Were they worth the having? Do they bring life, or a parody of life? Has nature—that is, the divine order of things—been helped or thwarted? For the time, thwarted, but not for long. The suffering, or at best, the lethargic existence, has been successfully protracted, but the body will soon falter and fail in the unwonted functions forced upon parts of it made for other uses, and death comes, to the relief of the dying and living, alike.

"Nature has kindly smoothed the sufferer's pillow by leading the way to that gradual exhaustion of the vital powers which follows the refusal of the stomach to receive or to digest food.

"To force nutriment into the system in such a case through other channels is simply to prolong a useless struggle at the cost of misery to the patient and to the profit of no one but the doctor and the nurse."

"In determining the nature of a disease, we look for the cause to the symptoms

"Nature has so ordered it that symptoms are observed at that time of life when life is most worth saving. A lesion of one organ may then be expected to produce a reaction throughout the system. There is a general sympathy of the parts. On the other hand, in old age the outward manifestations of an interior lesion seldom indicate that more than one organ is affected, and are often hardly noticeable at all. The patient does not know that he is a patient. There is no occasion that he should. The weakest part of his bodily mechanism has broken down. Why patch it up? Another is hardly less weak, and must soon succumb. Better for him and for his friends that his last days should be unclouded by the apprehension of coming death, and the change come to him quietly as a dream in sleep.—*The American Lawyer.*

***

*Property in Air.*—An extremely delicate point in law, and one which will greatly interest bicycle riders, has just been brought up at Mansfield, Ohio. It appears that a man while recently wheeling about the suburbs noticed that one of his pneumatic tires was becoming soft. He explored his toolbag but found that his pump was missing. It had been purloined by his wife, though this fact has nothing to do with the matter in hand. Fearing evil consequences for the tire, he turned in at a convenient repair shop and mentioned the difficulty.

The repair man immediately pumped up the tire, and the rider thanked him and was about to leave when the man demanded five cents.

The wheelman explored his pockets, but discovered that he had either neglected to transfer his money to his bicycle garments or that his money had gone in company with his pump—though this point, also, however interesting it may be to married men, has no bearing on the present case.

The bicycle owner explained the situation to the man, produced a visiting card and promised to step in the next morning with the money. The bicycle man replied, in effect, that he wasn't born yesterday, that there was much crime stalking abroad, and that he must insist on immediate settlement. The other made a reference to the notoriously anæmic condition of a stone, and told the thrifty repairer that if he didn't choose to wait for his pay, he could open the valve and take out the air which he had inserted, but that if he took more, even to the extent of the twentieth part of one poor scruple, as Portia remarked to Shylock—nay, if the valve did hiss too much but in the estimation of a hair, he would have the law on him.

The bicycle man more hardy than the Jew of Venice, with a remark that his deeds were upon his head, wrenched off the cap and punched the valve with a shingle nail. There was an ominous hiss. He punched again, but the valve refused to close. The air all escaped, and the cyclist, with observations which led the bystanders to believe that the quality of mercy was going to be badly strained, trundled his bicycle home.

The next day the matter was brought into court by the wheelman suing the repair man for damages. The repairman made a counter-claim for his five cents. Each had provided himself with learned counsel and legal lore of considerable value transpired. Early in the proceedings the wheelman's lawyer set up the contention that there could be no property rights in air, that it existed, so to speak, *fera natura*, and therefore the bicycle man's claim of five cents could not lie.

Counsel for the repair man rose to point out what the intelligent court must already know, to wit, that his learned opponent was an ass. That air in its native state, blowing where it listeth, is, of course, free to all, and can be lawfully seized of none: but that condensed air is a manufactured product as much as artificial ice, or bricks, or the sheep-skin diploma which in some inscrutable way his able opponent had become possessed of.

The court acquiesced in this view of the case.

Counsel for the rider said he bowed to the superior knowledge possessed by his scholarly opponent concerning wind, and asked leave to add ten cents to the claim of his client, he estimating that there was

merchantable atmosphere in the tire to that amount when his said client entered the shop. Counsel for the repair man responded by giving notice that he should prosecute the plaintiff for obtaining goods under false pretences, to wit, five cents' worth of condensed air, when he knew, or ought to have known, that he had no money with which to pay for it.

Counsel for plaintiff said that no married man could know when his wife had been through his pockets, though no doubt the wife of his learned brother had given up the practice years ago, never having found anything.

The learned brother replied by admitting that when he put his hands in his pockets he was not usually rewarded by finding much cash, but that so far he had managed to keep his hands out of other folks' pockets, a practice his esteemed opponent would do well to follow.

At this point the court rapped for order and announced the decision—five cents' damages for plaintiff, and judgment for five cents for the defendant, the costs to be shared equally. Learned counsellors collected ten dollars each from their respective clients and went away arm in arm; and the equal and exact justice before the law obtainable by all men was again vindicated.

All of which should furnish much food for thought to married men, bicycle riders and repairshop proprietors.—*Hayden Carruth, in Saturday Evening Post, Philadelphia*

***

*Trusting the Legislature*:—To curb the power of legislatures is the central idea of most persons who distrust the common people. This is a fundamental error. Within the long-established lines of our constitutional freedom the legislatures ought to be left free to speak the will of the people. Temporary mistakes and serious mistakes have been made and will be made by our legislatures. But they represent the public; and any attempt to deprive them of the power to determine the great questions of public policy which legitimately belong to the law-making department is not only unwise, but hopelessly futile. The great constitutional guarantees of life, liberty, and property are sufficient protection to the individual without straining them beyond their proper scope. There is a constant pressure on the courts for the annulment of obnoxious statutes, but while the judges sometimes go beyond their proper functions and attempt to revise the legislative discretion, they generally keep within the constitutional boundaries of judicial power with admirable judgment. They clearly teach that the remedy for bad legislation is better legislators. It cannot be too often, too

plainly, or too emphatically repeated that popular government cannot go on toward perfection without leaving to the legislatures, with all their capacity for mistakes and folly, the full measure of legislative power. Legislative mistakes must be corrected by better legislation. To put the legislature under guardianship would indicate the failure of government by the people. If people are fit to govern themselves, they can choose legislators who are fit to make laws.—*Case and Comment.*

***

*Is a mustache property?*—If so, what is its value? These points will be raised in a very peculiar suit which is coming up at the next term of court in a town in Georgia. The facts are briefly these: almost a month ago a well known travelling man was staying at the leading hotel of the place, and went to the cigar stand one day to get a light. They had a new-fangled concern that spouted out a jet of flame when the lighter was lifted, but on this particular occasion it hung fire. The drummer way trying to make it work, when all of a sudden it blazed out like a volcano and licked off his long, beautiful blonde mustache. He was furious, of course, because the mustache had been his chief ornament and pride, but the affair might still have passed off without trouble if he hadn't been so unmercifully chaffed. The upshot of this was that he demanded damages. The landlord laughed at him, and he then instructed a lawyer to bring a suit for $2,500. The paper will be filed in the next term of court, and will contain some interesting allegations. It will be claimed that the mustache was of direct assistance to its owner in earning a livelihood, insomuch as it gave him a distinguished appearance, and thus faciliated his interviews with the trade. Its loss, he holds, was a disfigurement which has occasioned ridicule, falling off in prestige and consequent shrinkage in business. He will also allege that his altered appearance caused great mental anguish to himself and his wife, and that that species of suffering may be reduced under the law to dollars and cents. Incidentally he will try to prove that the absence of a mustache affected his eyesight. So, as one may observe, a good many interesting and delicate questions will be raised, and doubtless the case will attract wide attention. What sort of defence will be set up remains to be seen.—*The Albany Law Journal.*

***

*Duty to stop Train for fallen passenger*:—A novel decision was rendered in *Reed Louisville & N. R. Co.* (Ky.) 44 L. R. A. 823, holding that when a passenger is thrown or pushed from a train without any fault of his own, it is the duty of the railroad company to stop the train and

rescue him if the circumstances are such that he is liable to perish or suffer great injury unless rescued, provided that this can be done without imperiling the other passengers, and that the trainment could not provide for his rescue by other means. The fact that a passenger has, by accident or the wrong doing of others, been thrown from his train, will not terminate his relation to the carrier. That he may be a passenger before he enters the train is well established by the cases cited in the note to *Webster* v. *Fitchburg R. Co.* (Mass) 24 L. R. A. 521. It is equally certain that he may continue to be a passenger after leaving the train, as is shown by all the cases concerning injuries to a disembarking passenger on account of defective platforms and premises. The duty of the railroad company to care for persons thrown from trains upon its track and in such condition as to be in danger of being killed by other trains has also been enforced in Cincinnati, *I. St. L. and C. R. Co.* v. *Cooper* (Ind.) 6 L. R. A. 241, and *Cincinnati H. & D. R. Co.* v. *Rassen* (Ohio) 16 L. R. A. 674. These decisions, although forming a new class, are abundantly justified by the fundamental principles which govern the duties and liabilities of common carriers.

***

*Ideal of the Good Lawyer.*—For your exemplar let me commend the ideal of a good lawyer, I do not say the great, but the good, lawyer, an ideal that has been realized in the life of every substantial city and court-house town, especially in the older neighbourhoods. A man of kindly and benignant disposition, friendly alike with his well-to-do and his poorer fellow townsmen, acquaintance with their habits and individual history and with a pretty accurate knowledge of their opinions and prejudices, as well as of their ways and means; genial and sociable, yet dignified and self-contained, and of staid and comfortable appearance; in manner alert, in conversation always moderate and respectful; shrewd in his observations, wise, but with perennial humor and love of pleasantry; as a citizen always concerned and active in the interests of his town, his State, and his country; not an agitator nor a perpetual fault-finder, nor giving out the intimation that he is better or wiser than others, but ready to confer, to adjust, to agree, to get the best possible, if not the utmost that is desirable. To him the people turn in local emergencies for guidance and counsel on their public affairs, even partisanship fearing not to trust to his honor and wisdom; so free from all cause of offence that there is no tongue to say a word against his pure integrity; too dignified and respectful to tempt familiarity; too genial and generous to provoke envy or jealousy; revered by his brethren of the bar; helpful and kindly to the young; in manner suave and

polite, with a fine courtliness of the old flavor which Clarendon described in John Hampden as a flowing courtesy toward all men; successful of course in his practice, but caring less for its profits than for the forensic and intellectual delight which the study and practice of the law bring to him. He knows much of the old "learning in the law," can tell of fines, of double vouchers and recoveries, of the "rule in Shelley's case," though he keeps all these things in mind as collectors treasure their antiques and curios, more as objects of art and historical interest than of practical utility. His mind is grounded upon the broad and deep principles of jurisprudence rather than upon "wise saws and modern instances," but over all is reflected the illumination of a strong common sense and a refined tactfulness.

In the judgement and feelings of the community there is something of the venerable and illustrious attached to his name, not for his learning in the law, not for his success as an advocate, nor for his mere usefulness to his fellow-citizens as a counselor and guide, but for the benignant influence of his whole life and character, and when he dies, to every mind there comes a suggestion of epitaph that shall most fittingly preserve the estimate which the people have formed of him: "The just man and the counselor."—*From the address to the graduating class of Yale Law School on June 26, 1899, by Mr. Griggs, Attorney-General of the United States.*

***

SOME WELL-KNOWN ENGLISH JUDGES:—In the memorials of Sir Roundell Palmer, the Earl of Selborne, we find some interesting and freely spoken remarks regarding the characteristics of the judges of his day. He says:—

"The Judges before whom I practiced in my younger days were Lord Cottenham and Lord Lyndhurst, Lord Langdale at the Rolls, Sir Lancelot Shadwell as Vice-Chancellor, and Lord Abinger and Baron Alderson on the equity side of the Court of Exchequer. Among these, Lord Cottenham and Baron Alderson were (judically) pre-eminent. Lord Cottenham was not brilliant, but he was one of the best lawyers who, after Lord Eldon's time, sat in the Court of Chancery. He heard arguments patiently, and the public had confidence in his judgments. He was a silent, reserved, and not very sociable man; by no means free from personal antipathies and political prejudices. But of myself he took kind notice, though I was not on his side in politics. I was one of the few juniors who were sometimes honored by invitations to his house; and on at least one occasion the marked attention which he paid to an argument of mine was useful to me with clients. Lord

Lyndhurst (as all the world knows) had the shining qualities, and the graces of manner, which Lord Cottenham entirely wanted; but he was not, within the sphere of my observation, great as a judge. My knowledge of him in that character was only during the last Chancellorship, from 1841 to 1846; when he took things very indolently and easily affirming almost indiscriminately the judgments brought before him on appeal. It was depressing to argue before a Chancellor whose heart did not seem to be in the business; however famous he might be as an orator or a statesman.

"Lord Langdale and Lord Abinger did not, upon the bench, altogether maintain the reputation which they had gained at the bar. Lord Langdale was dignified in manner—perhaps a little too much so; he was conscientious and painstaking, and much more independent than Sir Lancelot Shadwell. But it was not possible to avoid comparisons between him and the leading counsel in his court, Pemberton Leigh, unfavorable to the judges; nor was the case much mended when George Turner succeeded to Pemberton Leigh.

"Sir Lancelot Shadwell (of whom I shall presently say more) was a very kindly and good-humored, but a weak and rather eccentric, man. A story was current of his answer to somebody, who suggested that a judge must feel very anxious indeed, when he had to decide questions involving property of large value. "Not at all," he was reported to have said; 'one or the other of them must have it; what does it signify which?' It was with reference, probably, to this story, that a humorist wrote his epitaph while living: 'Here lies Sir Lancelot Shadwell, sometime Vice-Chancellor of England: What does it signify?'

"Baron Alderson was strong, vigorous, humorous, and very warm-hearted; a complete master of the law.

"The principal danger to a very successful advocate is arrogance. The great nursery of that fault, in my early days, was the Vice-Chancellor of England's court. Leach, an extremely clever man, who had presided over that court before my time, was himself very much noted for vanity. On his translation to the Rolls, he was succeeded by Shadwell, of whose nature it seemed to be a necessity to be governed by somebody. So remarkable was that weakness in him, that, whenever the principal leader of his court happened to be elsewhere, he surrendered himself to the nearest competitor, until the leader came back and resumed the command. The tyranny which successive leaders exercised over Shadwell would be inconceivable to those who did not witness it. The earliest of them was Sugden, whom I only knew after

he had left the bar,—a very clever man, profound in conveyancing and case-law; waspish, overbearing and impatient of contradiction. In Ireland, where everybody did homage to his superiority, he made a good judge; but in England, both as Chancellor and in the House of Lords, the quality of his judgments suffered from his inability to endure a brother near the throne. From him, the sceptre passed to Knight Bruce,—clever, witty, of quick penetrating discernment, generous to and liked by juniors, and with much miscellaneous knowledge of other things as well as law, which he had picked up for himself; for he was not a public school or university man. The seeds of mutual dislike between him and Lord Cottenham were sown when that great lawyer, plain and dull of speech, had to endure what he regarded as daily affronts from his eloquent competitor. They bore fruit when the one sat as Judge of Appeal over the other; for, if Lord Cottenham did not approach his judgments with a disposition to reverse them, it was scarcely a less evil that Knight Bruce thought he did. Those judgments suffered, as contributions to the science of the law, from the strong marks of his personality which were impressed upon them. He was a sound lawyer, and never lost the thread either of facts or of arguments. But his judgments were generally short, sententious and dogmatic, and when studied and elaborate, they were apt to have a flavor of rhetoric, and sometimes humor—admirable in itself, but less appropriate on the judgment-seat than elsewhere.

"When Sir James Knight Bruce became one of the additional Vice-Chancellors appointed in 1841, he was succeeded, as Lord of Sir Lancelot Shadwell's Court, by Bethell. In the exercise of that power, Bethell was more audacious and less ceremonious than either of his predecessors. Whenever things seemed to be going against him (as was liable occasionally to happen, when he was compelled by other engagements to leave cases for a time in the hands of his juniors), he was not careful to preserve so much even as an appearance of respect towards the judge; which Knight Bruce had always done. This habit of imperiousness was a drawback upon his later triumphs, and in the end contributed to his fall. So great was his antipathy for Knight Bruce, that, when Chancellor, he would never sit with the Lords Justices, of whom Knight Bruce was then one;—an arrangement with which they, on their part, were not dissatisfied."—*American Law Review.*

***

*How can a Lawyer argue for a Client whom he thinks wrong?*—

The Earl of Selborne, whose character and position give his words authority, thus answers the question :—

"A question of casuistry has often been raised, which was propounded to me by Patrick Cumin (secretary to the Education Department of the Privy Council), through my brother Edwin, in 1845. 'How,' he asked, 'can a lawyer argue for a client whom he thinks wrong?' This was never to me a practical difficulty. The duty of a lawyer, under such circumstances, has, of course, its limits. He should always, and then more than ever, be on his guard against offering to make himself witness as well as advocate, and to corroborate his arguments by any statement or insinuation of personal belief. But it is the right, even of those who are most in the wrong, to have the benefit of a fair and public trial according to law, and to have their evidence properly laid before judge or jury, and the arguments which can honestly be advanced on their side skilfully and fairly stated. It is the advocate's part to do this. If he were to refuse to undertake any case of which, upon the materials before him, he might have formed an unfavorable opinion, he would not be a minister of justice, but the reverse. Not only would he be encroaching upon the office of the judge, and doing what (if all other advocates did the same) would, before and without trial, practically shut out the client from having his case fairly presented, but his judgment might, after all, be mistaken. It has happened to me, not very seldom, that the end of a case has been contrary to my first impression of it, and that I have, nevertheless, been satisfied that justice was done. In the greater number of cases, the result is in accordance with the expectations of counsel; but the client, if he suffers a merited defeat, has had that unobstructed access to the seat of justice which is every man's right".—*American Law Review.*

***

*Lord Chief Justice Russel on Legal Education*:—Lord Russell, of Killowen, recently delivered an address in the hall of Gray's Inn, in connection with the Moot Society of that Inn, which was thus condensed in the *Law Journal*:—

Lord Russell of Killowen said he would apportion his remarks among three topics—legal education, the moot system, and the best mode of argument in court. Referring to the keen interest he took in the improvement of legal education, he disclaimed all thought of depreciating the efforts made by the Council of Legal Education or the abilities of the various readers and lecturers. But legal education could only be imparted properly by a permanent body partaking of a collegiate character. The best lecturers could not be had under the present system, in which a man was a professor to-day and to-morrow was not. The men must be secure in their position, and must devote themselves

to a special branch of the law. They must specialize like other scientists. He referred to the recent discussion as to the admission of aliens to the English bar, and commended the wise resolution of the Benchers of the four Inns to admit them. He eulogized the professions of architecture, medicine, etc., for admitting to their ranks men of all nationalities. Thereby the profession was enriched, and "we of the bar" have nothing to fear from competition. The more the merrier. Every student who studied here became, when he returned to his own country, a missionary to inculcate the excellence of the English Law and the English civilization. Our law combined the highest individual freedom with the greatest well-being of the community. He strenuously urged them all to aspire after the highest ideals in everything. Turning to the question of moots, he paid a merited tribute to Gray's Inn as being the last to discontinue those ancient exercises and the first to revive them, and he hoped that the time was not far distant when they would form an integral part of the qualifications necessary for call to the bar. The bar had great privileges, and it should endeavour to prove itself worthy of them. A barrister of seven years' standing was eligible for almost any post, except that of archbishop or admiral. The third part of his discourse was that which perhaps best pleased his audience. Indeed, it may be said that his generous welcome to strangers was received with something like a sigh by those who know how keen is the competition at present. Arguments, he said, should be clear, simple, direct and fair. The advocate should have the judicial faculty, and be able to view his adversary's case as well as his own. He must be astute to detect the turning point, and mass on it all his strength. The best arguer *in banc* was, in his opinion, the late Lord Chief Justice Mellish, and his excellence was chiefly due to two causes—he cited but few cases, and he was very concise. He eulogized the advice which Sir William Follett gave to the late Lord Coleridge when about to join the bar: "In stating your own case, never neglect to state your opponent's case also, for it is most probable you will do it less favorably than he himself would." Three kinds of arguments were to be avoided. There was what he would style the "Plunge-into-the-cases argument." Before meddling with cases the advocate should inform himself what was the principle of the question, and next, what were the facts of the particular case. In this connection he recounted an experience of his own at the bar. It was in 1861, during the American War, and was a question of blockade running. He had amassed a quantity of cases and was about to cite them before Lord Westbury when that judge counseled him first of all to get hold of the facts of his case, and then, perhaps, he would discover how small a proportion of his cases were really in

point. Then there was the "Promissory argument." Some counsel would say, "I don't mean, m'lud, to deal with this point just now, but later on I hope," etc. Lastly, there was the "Cocksure argument," and it was, in its own way, the most reprehensible of all. Positive people were seldom right.—*American Law Review.*

***

*Talfourd on forensic qualities*:—"A sense of truth is ever in his [the advocate's] way. It breaks the fine, flimsy, gossamer tissue of his eloquence, which but for this sturdy obstacle might hang suspended on slender props, to glitter in the view of fascinated juries. It is seldom that a young barrister can employ the most efficacious mode of delighting his audience unless he is nearly on a par with them, and thinks, in honest stupidity, that he is pouring forth pathos and wisdom." This is a fairly arguable question. But Talfourd was probably speaking out of the fullness of his experience, and no doubt he occasionally felt punctiliousness to be an inconvenient virtue when endeavouring to convince the twelve British shopkeepers.—*American Law Review.*

***

*Restitution of Conjugal Rights: Husband not bound to receive a wife back who is addicted to promiscuous kissing*:—We have recently called attention to the increasing number of suits for the restitution of conjugal rights which come before the Probate, Divorce, and Admiralty Division of the High Court of Justice in England. A case of this character was lately tried before Sir Francis Jeune and a jury, in which the husband objected to taking his wife back because she was too much addicted to the kissing habit. She had a liking for the stage and the society of actors, and allowed several of the male actors to kiss her. These gentlemen, however, insisted that no inference of immorality should be drawn from their conduct or that of the lady in this respect, one of them testifying that he kissed at the ladies of the company to which he belonged and called each one "My dear." In charging the jury the judge characterized this witness as "a young scapegrace, whose chief occupation, according to his own showing seemed to be putting his arms around the ladies of the company and kissing them." The jury refused to compel the husband to receive his wife back into his home, not, however, because of the kissing, but on account of graver offences which the evidence established againt her.—*New York Sun.*

***

*The Punjab Chief Courts Act of* 1899.

Act XXV of 1899 has amended the Punjab Courts Act (XVII of 1884) in some important points as regards second Appeals and Revision Cases.

The new provision which is substituted for S. 40 of the old Act is as follows :—

"40. A further appeal shall lie to the Chief Court in any of the following cases from an appellate decree of a Divisional Court on any ground which would be a good ground of appeal if the decree had been passed in an Original Suit, *viz* :—

(*a*) In a small cause or unclassed suit,

i. If the value of the suit is Rs. 1,000 or upwards or the decree involves directly some claim to or question respecting property of like value and the decree of the Divisional Court varies or reverses otherwise than as to costs the decree of the Court below : or

ii. If the value of the suit is Rs. 2,500 or upwards or the decree involves directly some claim to or question respecting property of like value.

(*b*) In a land suit,

i. If the value of the suit is Rs. 250 or upwards or the decree involves directly some claim to or question respecting property of like value and the decree of the Divisional Court varies or reverses otherwise than as to costs the decree of the Court below :

ii. If the value of the suit is Rs. 1,000 or upwards or the decree involves directly some claim to or question respecting property of like value."

Section 70 of the Act as amended runs as follows :—

"70. (1) The Chief Court may call for the record of any case in which no appeal lies to it and may pass such order in the case as it thinks fit,

(*a*) if the Court by which the case was decided, appears to have exercised a jurisdiction not vested in it by law or to have failed to exercise a jurisdiction so vested or to have acted in the exercise of its jurisdiction with material irregularity ; or

(*b*) if on application made to it, the Chief Court is of opinion that there is an important question of law or custom involved and that such question requires further consideration.

Provided as follows :—

(1) No application under clause (*b*) shall be admitted after the expiration of 90 days from the date of the order in respect of which the application is made unless the applicant satisfies the Chief Court that he had sufficient cause for not making the application within that period.

(2) No such application shall be admitted in a small cause under the value of Rs. 1,000 or in an unclassed suit under the value of Rs. 200.

(3) On any such application the Chief Court shall not review the decision of the Court below except in so far as such decision involves the question of law or custom in respect of which the application has been admitted and

(4) When any application has been admitted the Chief Court shall subject to the last foregoing proviso treat the matter of the application as if it were an appeal.

*Explanation.*—A question of procedure is not a question of law or custom within the meaning of clause (*b*).

The effect of the above provisions is that there is no right of second appeal or of revision in suits of small causes of less value than Rs. 1,000.

In small cause suits of the value of above Rs. 1,000 and below Rs. 2,500, a second appeal lies where the decree of the Divisional Court varies or reverses except as to costs the decree of the Court of first instance.

In land suits where the value of the subject is below Rs. 250 there is no second appeal.

If the value is Rs. 250 or upwards and below Rs. 1,000, the decree of the Divisional Court must to give a right of second appeal vary or reverse others than as to costs the decree of the first court."

The provision that there shall be no second appeal or revision as regards all suits of small causes of less value than Rs. 1,000 is a drastic measure likely to cause hardship in many cases. The Civil Procedure Code fixes Rs. 500 as the limit for second appeals and in all suits of whatever value tried under the Provincial Small Cause Court Act, S. 25 gives a salutary power to the High Court to interfere by way of revision on questions of law. The reason of the Bill the Hon'ble Mr. Rivaz says in justification of the measure is that the Chief Court is unable to cope with the work which comes to it under the existing system. "The privilege which is said to be so highly prized by the Punjabi litigant, of being able to get his case heard by the highest court of the province is one which under present conditions takes a pretty long time to attain for him. If the existing system of appeal were maintained, the Chief Court would have to be strength-

ened even above its present number of judges and this is out of the question." The reasons given can scarcely be regarded as satisfactory. In this country for a long time to come the volume of litigation in suits of small value will necessarily be large as it is dependent upon the material condition of the people which is comparatively speaking low. It must also be remembered that the value of a suit to the litigants concerned does not always depend upon its pecuniary value and the results in some classes of suits have far-reaching importance, in some rent suits for instance,and aggrieved parties, must have in suitable cases some means of invoking the judicial determination of the highest court in the Province. The Lieutenant-Governor referred to this question as follows :—"The money limit for further appeals as of right is therefore not a new feature. It is borrowed from the existing Act, and though it may not be logically defensible in the abstract, its justification lies in the fact that the Legislature has to devise a compromise between two needs and that it furnishes a simple and practicable means of shortening the cause of a large section of the less important class of litigation of the Province." There is a disposition on the part of the responsible officers of Government to regard as an unhealthy sign of the times and as due to a spirit of mischievous litigation, the fact that the legal business in a province has outgrown the capacity of the courts originally constituted to work it off. We venture to think that this is a mistake. The progress of the country as a whole, the awakening of people to their rights, the opening of new industries and occupations since the time when the courts were first organised are all factors to be reckoned with and they are bound to multiply the causes that come for determination before the courts. It is, therefore, a very unsatisfactory feature of the new Act that it has enacted a procuration rule for the elimination of causes that have to come up before the Chief Court for appeal at revision.

In the matter of second appeals the Punjab Courts Act contains two provisions which are a distinct improvement upon those contained in the Code of Civil Procedure. They are (1). The court hearing the 2nd appeal has the right to re-open questions of fact as well as questions of law or custom. The want of a similar provision in the Civil Procedure Code has been much felt so far at least as this Presidency is concerned. We have come across many cases in which elaborate and well-considered judgments of courts of first instance have been reversed on questions of fact by most perfunctory and unsatisfactory judgments of District or Subordinate Judges upon which the law sets the seal of finality. Curiously enough some objection seems to have been advanced in the Punjab as regards the system of allowing an appeal on the whole case including the facts. The Honourable Mr. Rivaz says with reference to it. "Firstly, there is a strong

weight of opinion that the time has at all events not yet come for altogether abolishing the present special system in the Punjab of allowing a further appeal in the facts especially in land suits as well as on points of law or custom; secondly, the law of second appeal as at present contained in the Civil Procedure Code has been declared by many competent authorities to need amendment and its revision will in all probability be shortly taken in hand." We hope for a speedy fulfilment of the announcement contained in the last sentence.

2. The second point on which the Punjab Court Act differs with advantage from the Civil Procedure Code as regards second appeals is that in certain suits the value of the subject matter of which does not of itself give a right of second appeal, there is a right of second appeal if the first appellate court reverses or modifies except as to costs the decree of the court of first instance.

Having regard however as the Lieutenant-Governor admits "to the peculiar conditions of the Province which is mainly one of small peasant proprietors whose rights are regulated by a body of custom not yet codified nor even fully ascertained by judicial decision," we cannot approve of the prohibition of a second appeal in all cases of suits relating to land where the land is below Rs. 250 in value or when the land is between Rs. 250 and Rs. 1,000 in value unless the first appellate court reverses or modifies the decree of the first court, even although an important question of law or custom may be involved therein.

---

## NOTES OF AMERICAN CASES.

A rule of a railroad company that a baggage master shall not receive baggage into the baggage room until a ticket shall have been procured is held, in *Coffee* v. *Louisville & N. R. Co.* (Miss.) 45 L. R. A. 112, to be an imposition on the public, unreasonable, and void.

An agreement by which an attorney is to bear the cost and expense of litigation, in consideration of an interest in the recovery, is held, in *Geer* v. *Frank* (Ill.) 45 L. R. A. 110, to be champertous and void, and such an agreement with one of two attorneys, included in a contract made with both of them jointly, is held to invalidate the entire agreement with both of them.

***

The imposition of a sentence in a criminal case in excess of what the law permits is held, in *Re Taylor* (S. D.) 45. L. R. A. 136, not to make the sentence entirely void, but to leave the legal or authorized portion operative. With this case is an extensive note reviewing the Federal, state, and English decisions on the effect of excessive sentences.

Damages for mental anguish caused by negligent failure to deliver promptly a telegram stating that a person has been killed are held recoverable in *Cashion* v. *Western Union Teleg. Co.* (N. C.) 45 L. R. A. 160, although the message was sent by an agent, without disclosing who sent it or the relations of the sender with the addressee.

* * *

The existence of a debt due by the drawee of a bill of exchange to the payee is held, in *Citizens' Bank* v. *Millett* (Ky.) 44 L. R. A. 664, to constitute a sufficient consideration to bind the drawer upon his promise to pay the bill and render him liable for the amount, although he was a stranger to the debt.

* * *

Owners of property so near to a house of ill fame that their enjoyment of their property is affected by disgusting sights and sounds in such house are held, in *Blagen* v. *Smith* (Or.) 44 L. R. A. 522, to sustain an injury different in kind from that which is suffered by the public at large, and therefore entitled to an injunction against the maintenance of the nuisance.

* * *

Children to whom a policy of insurance on their father's life is payable if their mother be not living at his death are held, in *Voss* v. *Connecticut Mutual L. Ins. Co.* (Mich.) 44 L. R. A. 689, to have a vested, although contingent, interest, and on the death of one of them before his mother's death his interest is held to descend to his widow and children.

* * *

The question of the existence of an extraordinary occasion of sufficient gravity to justify a call for an extra session of the legislature is held, in *Farrelly* v. *Cole* (Kan. (44 L. R. A. 464, to be a matter for the determination of the governor alone in the exercise of his discretion as a sworn officer, and this discretion cannot be challenged or reviewed by the courts.

* * *

The rule that an employer is not liable for the negligence of an independent contractor is denied application in *Bonaparte* v. *Wiseman* (Md.) 44 L. R. A. 482, where a contractor is employed to excavate a lot close to a neighbour's house in a populous city, but the proprietor is held liable to see that in doing the work due care is taken to protect the neighbour's wall, or timely notice given him to protect it.

* * *

Permitting a shivered pane of glass to remain in a window above a street where pedestrians are frequently passing, when there is an apparent danger of the pieces falling or being shaken out by the wind or otherwise, is held, in *Detzur* v. *B. Stroh Brew. Co.* (Mich.) 44 L. R, A. 500, to be such negligence as will create a liability to a person who is struck by a piece of the glass while on the sidewalk below the window.

The maintenance of dangerous machinery on private grounds unprotected from visits of trespassing children, is held, in *Biggs* v. *Consolidated Barb-Wire Co* (Kan.) 44 L. R. A. 655, to render the owner of the land, who has knowledge that children and others are accustomed to frequent the grounds and climb upon structures which support the dangerous appliances, liable in damages for an injury to a boy caught in the machinery and killed.

***

For the damages caused by the erection of a pest house near the residence of a person, it is held, in *Clayton* v. *Henderson* (Ky.) 44 L. R. A. 474, that a city is liable, notwithstanding the fact that it is erected within a mile of the city in violation of a statute which expressly makes the officers liable, without declaring that the city is liable.

***

A surety who has been obliged to pay the obligation is held, in *Pace* v. *Pace* (Va.) 44 L. R. A. 459, to have the right to prove the entire debt against the insolvent estate of his co-surety and receive dividend upon the entire debt until reimbursed with half of the common burden which belonged to the co-surety.

***

The right of a city to take a bond from a street contractor to keep a street and pavement in repair for five years after performing the contract is denied in *Portland* v. *Portland Bituminous Paving & Imp. Co.* (Or.) 44 L. R. A., 527, when the bond covers in effect all injures liable to arise from whatever source, and is not limited to defects in the performance of his contract. With this case is a note collating the decisions on the power of a city to bind a contractor to repair a pavement which he makes.

***

The offer of a reward for testimony that shall secure the conviction of persons who set fire to buildings within city limits is held, in People *ex rel. Maynard v. Holly* (Mich.) 44 L. R. A. 677, to be within the general power to make regulations for the safety and general welfare of the inhabitants.

## REVIEWS.

*Commentaries on the Procedure of Civil Courts in British India*, by Hukm Chand, M.A., published by the *Bombay Education Society's Steam Press.*

The first volume of Mr. Hukm Chand's Commentaries on Civil Procedure has been completed. It deals with the first 111 Sections of the Code of Civil Procedure and extends to 834 pages. The work is on similar lines to those on "*Res judicata*" and "*Consent*" by the same

author which have already won for him a high reputation as an author. Mr. Hukm Chand made a novel departure in his former works in drawing largely upon other civilized systems of law for purposes of explanation, illustration or comparison. It was a wise and a welcome departure. No method can be more helpful for clear comprehension of the principles of law or for discrimination between what is fundamental and what is accidental or local. The wealth of learning of the author, and his prodigious industry and his minute and accurate knowledge of different systems of law have earned for him the unstinted praise of the legal profession. Mr. Hukm Chand is gifted with untiring literary activity and we have the benefit of his labors in the volume now before us. His new work will carry the author's reputation even higher and further than his former works. The amazing learning and industry displayed and the thoroughness and accuracy of treatment of the different topics must secure for the work the foremost place among works on Civil Procedure. But for its cost and bulk, it is bound to displace other commentaries upon the subject in this country. Mr. Hukm Chand is ready to face even these objections and overwhelm his critics with a host of precedents. We learn from the preface that Bolze's work on the Practice of the German Supreme Court in civil matters covers twenty volumes, that Rintelen's exposition of the law of Civil Procedure covers four volumes, that Garsonnet's work on the practice of the French Courts and Robinson's work on the Practice of the Courts of Virginia each covers seven volumes, that Wait's practice of the New York Court is in six volumes, that the Commentaries by Pisanelli on the Italian Civil Procedure Code covers seven volumes, that the work of Franceso Recci is in four volumes of 700 pages each and that Stover's work on the New York Procedure Code is in three volumes with 3,329 big pages. Mr. Hukm Chand hopes to complete his work in three volumes and if the size of the present volume is to be the standard, the whole book will contain 2,500 pages. As Mr. Hukm Chand explains, the work is not a mere index commentary, or a handy repertory of all available authorities. The object of the author is to explain the rules of the Code and the general principles upon which they are based, and to cite all cases which appear to throw real light on any rule in regard to its nature, or to the extent, or mode of its application. The author is not unaware of the dangers incidental to citations from foreign laws and decisions, but he is equipped with the knowledge required to use the foreign sources of law with discrimination. Though the work will be specially useful to the profession in India, we have no doubt it will be widely appreciated throughout the English-speaking world. The book ought to find a place on the shelf of every lawyer in this country who can afford it.

UNIVERSITY LIBRARY LAW COLLEGE

The Madras Law Journal.

PART XII.] DECEMBER 1899. [VOL. IX.

## DEPOSIT OF TITLE DEEDS.

This is known in English Law as an equitable mortgage, as distinct from a legal mortgage.

Whether before the Transfer of Property Act an equitable mortgage could be created out of the Presidency Towns is rather a difficult question. No doubt the Privy Council in *Varden Seth Sam* v. *Luckpathy Royjee Lallah,* 9 M. I. A., p. 307, held that a deposit of title-deeds made in the particular case in the Presidency Town of Madras constituted an equitable mortgage though it was only known to the English Law, the decision being based upon the fact that, as the English Law was in force in the Presidency Town it might be presumed that the parties intended to be governed by that Law and that moreover it was in consonance with justice, equity and good conscience. Their Lordships in reversing the decision of Sudder Dewanny Adawlut observed at p. 324.

"The decision of the Sudder Dewanny Adawlut, so far as it respects the enforcement of the lien against the third and last defendants, appears to have proceeded upon the ground that the principles of the English Law applicable to a similar state of circumstances ought not to govern the decision of that suit in those Courts. This was correct if the authoritative obligation of that law of the Company's Courts were insisted on. There is properly, no prescribed general law to which their decisions must conform. They are directed in the Madras Presidency to proceed generally according to justice, equity and good conscience. The question then is, whether the decision appealed against violates that direction or not . . . . . The Plaintiff looked, not simply to the personal credit of the person with whom he contracted, but bargained for a security on land. If any positive law had forbidden effect being given to the actual agreement of the parties to create that lien the court, of course, must have obeyed that law. If the contract of lien were imperfect for want of some necessary condition, effect must have been in

like manner, denied to it as a perfected lien. But nothing of the sort is suggested . . . . . It is not shown that, in fact, the parties contracted with reference to any particular law. They were not of the same race or creed . . . . . The plaintiff is a Christian; the contract took place with parties living within the local limits of the Supreme Court of Madras, though it related to land beyond them. It is not shown that any local law, any *lex loci rei sitæ* exists, forbidding the creation of a lien by the contract and deposit of deeds which existed in this case; and by the general law of the place where the contract was made; that is, the English Law, the deposit of title-deeds as a security would create a lien on lands; though, as between parties who can convey by deed only or conveyance in writing such lien would necessarily be equitable."

In the case of *Himalaya Bank, Limited,* in *Liquidation* v. *F. W. Quarry,* I. L. R., 17 A., p. 252, it was held that before the Transfer of Property Act a deposit of title-deeds made in the Mofussil created a good equitable mortgage and as such was binding on the parties. The facts of that case were as follows: One F. W. Quarry overdrew his account with the Himalaya Bank. The Bank took on the 3rd May 1878 deposit of the title-deeds relating to Quarry's pro- property in Mussooree known as the Powy's Cottage estate. The transaction took place in the Mofussil, (Mussooree). Mr. Justice *Blair* observed at p. 256.

"It seems to me that there can be no question whatever that the deposit of deeds as security for an overdrawn account constitutes in English Law a good equitable mortgage and in Indian Law a good simple mortgage. It seems to me clear that upon grounds of common sense as well as authority it is reasonable to infer from the continuance for a long time of the deposit of title-deeds that they are intended, as between the parties, as security for a continued contemporaneous over-draft. I feel no doubt, therefore, that if the facts set forth by the plaintiff are proved, a perfectly good and efficient security was created by the deposit of these deeds in 1878." *Burkitt*, J., observed at p. 260: "Broadly stated the 1st defendant's contention is that S. 59 of the Transfer of Property Act, No. IV of 1882, did no more than codify the law as it existed when that Act was passed, and that as the first clause of that section undoubtedly now prevents the creation in the Mofussil of a mortgage by delivery of documents of title to immoveable property by a creditor with intent to create a security for Rs. 100 or upwards, it follows that such a mortgage was unknown to the law in the Mofussil

previous to the coming into force of Act IV of 1882, and cannot be enforced by suit.

In that contention I am unable to accede. I am of opinion that S. 59 of the Transfer of Property Act did make a very great and important change in the law. Before that Act came into force there was no law at all resembling the Statute of Frauds in force in the Mofussil. There was no enactment which required that a transaction of the nature of a mortgage securing Rs. 100 or upwards should be in writing and registered. The law then made no provision requiring contracts, *e.g.*, of mortgage or sale, to be in any particular form. Contracts might be oral or in writing, but, if reduced to writing, the Registration Act required that in certain circumstances, they should be registered.

That which a Court, bound to decide according to 'justice, equity and good conscience' in the absence of any express enactment has to look at is the intention of the parties to an agreement, and, on ascertaining that agreement, it is the duty of the Court to enforce it, if it be a lawful contract, without imposing on the parties to it a particular form which the law as it stood when the contract was made, did not require. Their Lordships of the Privy Council in 14 I. A., p. 89, interpret 'equity and good conscience to mean the rule of English Law if found applicable to Indian society and circumstances.' Now, bearing in mind *who the parties to this suit are* and the strong probabilities that they intended to contract according to English Law, it is difficult to imagine why the alleged contractual agreement (which is one of a nature recognized and enforced by the English Law) should be considered to be inapplicable to them. In *Varden Seth Sam* v. *Luckpathy Royjee Lallah* (9 M. I. A., p. 307) at pp. 324 and 325 their Lodrships of the Privy Council, applying the rule of 'justice, equity and good conscience' distinguishing between the *lex loci rei sitæ*, (*i.e*, the Mofussil) and the *lex loci contractus* (*i.e.*, the Presidency Town of Madras) held that the former law did not forbid the creation of a lien by a contract such as that sued on in the present case, *i.e.*, by deposit of title-deeds. The 1st defendant contends that the case is not in point, as the deposit was made within the Presidency Town. I, however, regard the observations of their Lordships as a clear authority for the proposition that no law existed forbidding the creation of a mortgage lien by deposit of title-deeds in the Mofussil of the Madras Presidency . . . . . I have come to the conclusion that up to July 1882, there was no difference between the law in the Mofussil and that prevalent in the Presidency Towns as

to the validity of a mortgage created on a deposit of title-deeds with a creditor with intent to secure a debt."

But be that as it may by the Transfer of Property Act, S. 59, it is now declared, that

"Where the principal money secured is Rs. 100 or upwards a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses where the principal money secured is less than Rs. 100 a mortgage may be effected *either by an instrument* signed and attested as aforesaid or (except in the case of a simple mortgage) by delivery of the property.

Nothing in this section shall be deemed to render invalid mortgages made in the Towns of Calcutta, Madras, Bombay, Karachi and Rangoon, by delivery to a creditor or his agent of documents of title to immoveable property, with intent to create a security thereon."

From the latter part of the section it is, therefore, apparent that delivery of title-deeds *except in the towns named* is of no effect and does not create any valid interest or charge in property (vide *Coggan* v. *Pogose*, I. L. R., 11 C., 158, at p. 160). For by the two former parts of the section a mortgage must be effected only in the modes prescribed therein and if not made in the mode prescribed therein no mortgage is created. The only exception that is made to it is that a deposit of title-deeds to a creditor or his agent of property (*wherever it may situate*) with intent to create security is a good mortgage.

Mr. Macpherson in his Book on Mortgages, p. 657, says that though a mortgage cannot be made by simple delivery of documents of title in other places than those named, yet the transaction would create a charge; for he says "by it (Sec. 100) immoveable property is by act of parties made security for payment of money to another, whilst owing to the provisions of this section (59), the transaction does not amount to a mortgage. If so, then the effect of delivery of title-deeds with the intent stated in the section would not appear to be very different whether the delivery was made within or beyond the limits of the towns specified, though no doubt the rights of a person having a charge are not so extensive as those of a mortgagee." This, it is submitted, is incorrect. If the parties intended to create a mortgage by a particular transaction and that transaction becomes infructuous by reason of

the prohibition of the Statute or some defect of formality prescribed by the Statute and the law says that no mortgage could arise out of the said transaction, no charge could arise by the fact that the parties intended that they should have some security. For example, if a mortgage deed is executed, but it is attested by only one witness instead of by two witnesses as required by the Statute then the said deed could not be proved and no mortgage in law is created. It could not be said that because the parties intended that there should be some sort of security, therefore, effect should be given to the transaction as creating a charge when effect could not be given to it, by reason of some cause created by the Statute, as a mortgage, vide *Madras Deposit and Benefit Society v. Oonnamalai Ammal*, I.L. R., 18 M., p. 29 at p. 30. Indeed if it should be held that the deposit of title-deeds in Mofussil can create a charge then it is doing indirectly what the Statute says ought not to be done or at any rate what the Statute does not recognize. For if some lien is created by the fact of the deposit outside Presidency Towns then the Statute would have expressly provided for it instead of declaring that only deposits made in the Presidency Towns are valid. Moreover it is begging the question to say that under section 100 a charge is created. For under the section a charge exists either by act of parties or by operation of law. The transaction created by deposit is one arising from act of parties. It cannot be said that by operation of law a charge is created. For we can find no law to that effect. Then it is one arising by act of parties. Section 59 says deposit (with the intent to give security) would not do except in the cases mentioned therein. Where the Law says that where parties enter into a particular transaction it must be in certain forms and invalidates such transaction if the prescribed formalities are not observed or where the Law says that certain transactions are only valid in certain places, then it is idle to say that notwithstanding those provisions effect should be given to it in some from or other, for one cannot do indirectly what the law prohibits. That appears to be the principle on which the decision in I. L. R., 18 M., p. 29, is based.

Of course even in the Mofussil the deposit of title-deeds would be some evidence of a contract to mortgage, where one exists, for instance, when a party agrees to execute a mortgage but before the

execution of the mortgage deed the debtor wants money urgently and offers to deposit title-deeds as evidence of his assent to execute the proper deeds, when called upon and asks the creditor to pay in advance and he so advances then the deposit of title-deeds is evidence of a contract to mortgage. But a contract to mortgage just as a contract to sell does not by itself create any security. It only enables the creditor to obtain specific performance of the agreement when he will be able to get a legal mortgage. But mere possession of title-deeds without evidence of the contract originating it does not create any security. Vide *Dickson* v. *Muckleston,* L. R., 8 Ch., p. 155. Of course where the relation of debtor and creditor subsists, the mere fact of possession of deeds by the latter generally raises a presumption that they were deposited with him as security for the debt; and it lies upon the debtor to rebut the presumption (Robbins' Law of Mortgages, p. 59).

Of course the last para. of the section (59) does not require that the property should be situated in the Presidency towns, so that the deposit of the title-deeds of property situated in the Mofussil but made in the towns aforesaid creates a good mortgage (See Macpherson, p. 657 and *Manekji Framji* v. *Rustomji Naserwanji Mistry,* I. L. R., 14 B., p. 269 at p. 271 and *Madho Das* v. *Ram Kishen,* I. L. R., 14 A., p. 238 at p. 241 and *Srinath Roy* v. *Godadhur Das,* I. L. R., 24 C., p. 348 at p. 349).

Another point noticeable in the provision is that the section (59) seems to make no distinction between legal and equitable mortgages as existing in English Law. The Transfer of Property Act indeed makes no distinction between Law and Equity, for the Act embodies or purports to embody the rule of Equity. Mortgages now exist in India under and by virtue of the Act. The only distinction drawn by the Act is that between mortgage and charge. Section 59 declares in what ways mortgages can be created (and deposit of title-deeds is one method) while section 100 deals with the case of a charge though necessarily there is no exhaustive treatment of the modes in which a charge is created.

A mortgage by deposit is a complete act and not an executory agreement. The holder of a registered instrument does not take priority (Vide *Coggan* v. *Pogose,* I. L. R., 11 C., 158). In England a purchaser for consideration without notice from the owner would

take in preference to an equitable mortgagee and though such equitable mortgagee may not be guilty of any laches or negligence. The question as to what is notice and what notice will defeat a legal mortgage is, though not altogether beyond the scope of the present enquiry a large one and I abstain from considering the same. Vide *Plumb* v. *Fluitt*, 2 Anstr. (1791) p. 432, S. C., 3 R. R., p. 605; *Birch* v. *Ellames*, 2 Anstr. (1794) p. 427, S. C. 3 R. R. p. 601 (where however it was held that the legal mortgagee had notice), *Hiern* v. *Mill*, 13 Ves. p. 104, (1806) 9 R. R. p. 149, *Whitbread* v. *Jordan*, 1 Y. and C, p. 303 (1833) S. C. 41 R. R. p. 281 at p. 291. The principle is also tacitly recognised in *Taylor* v. *Russell* (1891) 1 Ch., p. 8 at pp. 14 and 15. But in India it is submitted that would not be the correct view; a prior mortgagee with deposit of title-deeds would postpone a subsequent purchaser for value though without notice, for section 59 says that it is a mortgage and there is no reference made at all in the Act to any distinction between legal and equitable mortgages (*vide* I. L. R., 11 C., 158).

It is not necessary that there should be any writing to create the mortgage by deposit of title-deeds. If there is a writing to evidence the deposit merely it does not require any registration. For instance, when the debtor, while deposting the title-deeds and receiving a loan upon them or subsequently writes a letter or memorandum stating what he has done and the terms of the loan, such writing while admissible in evidence to prove the *facts stated,* does not constitute the contract between the parties, still less can it be said that the creditor's lien is created by the writing, for the mortgage is created by the agreement *evidenced by the loan and by the deposit.* (*Ex parte* Kensington, 2 V. and B., p. 82 (1813) 13 R. R., p. 32 at 34.) Mere deposit of title-deeds, without a single word passing operates as an equitable mortgage. The writing is only to prove the facts, *viz.,* the factum of the deposit and the factum of the loan. (Vide *Kedarnath Dutt* v. *Shamloll Khettry,* 11 B. L. R., p. 405 at pp. 411 and 414; *Jivandas Keshavji* v. *Framji Nanabhai,* 7 Bom. H. C., O. C. J., p. 45 at p. 62. *Oo Noung* v. *Moung Htoon Co.,* I. L. R., 13 C., 322. Where, however, there was no previous agreement but the equitable mortgage is created by the document itself, it has been held that the document would require registration, *Dwarkanath Mitter* v. *S. M. Sarat Kumari Dasi,* 7 B. L. R., O. C. J., 55 and *Bengal Banking Corporation* v. *Mackertich,* I. L. R., 10 C., 315).

A mortgagee in possession of title-deeds advancing further sums on the condition that he should retain the title-deeds as security for the advances, is entitled to be declared (an equitable mortgagee in respect of such advances). *Girendro Coomar Dutt* v. *Kurund Kumari Dasi*, 25 C., 611; In re *Beetham*, 18 Q. B. D., 380; Snell 10 Ed., p. 404; *Ex parte* Kensington, 2 Vesey and Beames, p. 82 (1813), 13 R. R., pp. 32 and 35; *Hiern* v. *Mill*, 13 Ves., p. 114, (1806) 9 R. R., p. 149.

Whether a mortgagee by deposit of title-deeds could by handing over the deeds to another assign over his rights to that other so that that other might be in a position to enforce the remedies of the original depositee is the next point for consideration. The Act makes no provision for it. But on principle it seems it could be so validly assigned; otherwise the object of the enactment in permitting the validity of mortgage by deposit would be defeated. The English cases favour this view and they might be looked at and followed when the Act itself is silent and does not either expressly or impliedly prohibit the same. (Robbins' Law of Mortgages, Vol. II, pp. 829 and 830). A distinction is drawn in the English cases between an assignment for consideration and assignment by way of gift. In the latter case, it will not do to have a purely oral voluntary gift and such a transaction confers no rights in the donee, *vide* Robbins, Vol. II, p. 829; *Re-Richardson, Shillito* v. *Hobson*, 30 Ch. D., p. 396). It seems that the Indian Law is also to the same effect. For an equitable mortgage of lands, &c., is an interest in immoveable property under sec. 123 a gift of immoveable property must be in writing registered and attested by at least two witnesses. If however there be a previous assignment in writing and the delivery of the deeds is subsequent in pursuance of such assignment, the assignment ought to be registered if the value of the immoveable property exceeds Rs. 100 and mere delivery gives no rights as it could not be proved, *Ganpat Pandurang* v. *Adarji Dadabhai*, I. L. R., 3 B., 312 at pp. 318, 319 and 329.

The last point in dealing with this matter is what the remedy of a mortgagee by deposit, is. Does a mortgage by deposit come under any of the classes of mortgage mentioned in section 58? The Act itself makes no provision for the remedy at any rate expressly. Nor does it in terms say to what class such mortgage belongs, Mr. Macpherson

thinks that it ought to be treated as a simple mortgage, (vide pp. 111 and 657) and that the rules applicable to a simple mortgage would be applicable to such mortgage. Mr. Shephard says (at p. 199 of his book, 3rd Edition) that the English rule may be followed and that the English rule is a suit for foreclosure or sale (citing Fisher, p. 787, 4th Edition). Fisher in paras 787 to 790 says that equitable mortgagee is entitled to both the remedies and doubts the correctness of the decision in *Pryce* v. *Barry*, L. R., 16 Eq. 153n, where it was held that he was not entitled to sale. He seems to think that if the equitable mortgagee thinks that his security is scanty he has a general right to a sale. He does not however state whether he is entitled to both the remedies at the same time as of right. There can be no doubt that there was some conflict in the English cases as regards this matter. Mr. Robbins (Vol. II, p. 995) states "It is now settled, after some difference of opinion, that an equitable mortgagee by deposit of deeds with or without memorandum, is entitled to foreclosure. In *Backhouse* v. *Charlton*, 8 Ch. D., p. 444, it was held by *Malins*, V. C., that the remedy was foreclosure and not sale. But in the case of *York Union Banking Co.* v. *Artley*, 11 Ch. D., 205., it was held by *Jessel*, M. R. that the equitable mortgagee is entitled to either sale or foreclosure." Under the Indian Act, section 67, a mortgagee is entitled "to obtain from the Court an order that the mortgagor shall be absolutely debarred of his right to redeem..., or an order that the property be sold," *i.e.*, foreclosure or sale. The latter part of the section makes an exception and states a simple mortgagee is not entitled to bring a suit for foreclosure, a mortgagee by conditional sale is not entitled to bring a suit for sale while the usufructuary mortgage is not entitled to foreclosure or sale. But no proviso is made as regards the equitable mortgage. As under section 59 he is a mortgagor, the language of the section seems to give the equitable mortgagee a right to sue for foreclosure or sale (vide *Lukshmeshar Singh* v. *Dookh Mochan Jha*, I. L. R., 24 C., 677 at p. 680. If this construction be right then the limitation would be 60 years (*Ramachandra Rayaguru* v. *Modhu Padhi*, I. L. R., 21 M., p. 326) under Art. 147 of the Limitation Act. This has been so expressly decided in *Manekji Framji* v. *Rustomji Naserwanji Mistry*, I. L. R., 14 B., p. 269. *Jardine*, J. holds limitation in such cases to be 60 years without deciding whether equitable mortgagee is entitled to sue for foreclosure only, but *Parsons*, J.

holds his remedy to be foreclosure or sale. Upon the latter view the Limitation would be 60 years even according to the decision of the Full Bench in 21 M., p. 326. But if he is only entitled to foreclosure only or sale only then the decision of the Bombay High Court could not be accepted in view of the said Full Bench decision of the Madras High Court. In *Srinath Roy* v. *Godadhur Das*, I. L. R., 24 C., p. 348, Mr. Justice *Jenkins* stated that the practice of the Calcutta Court had been to decree a sale only and he made a decree in that form only. Beyond the statement as to the practice, the Court did not go into the soundness or otherwise of the practice nor did it enter upon a consideration of the question whether he is entitled in one suit to ask for foreclosure or sale.

P. R. GANAPATI AIYAR.

---

## VISVARUPA'S COMMENTRY ON YAJNAVALKYA.—(*Contd.*)

19. **The krita is one sold by them. The kritrima is a son adopted by a man himself. The svayamdatta is one who gives himself. The sahodhaja is one accepted while yet in the womb."** [1]

The krita is one sold for price by his father and mother who have power to do so and is known as the krita son of the purchaser. The particle 'tu' is used to indicate the want of power in the mother, by parity of reasoning in the case of the adopted son (*a*). A kritrima is one who, being destitute of father and mother, is accepted as a son. The son self-given also is one of the same description, who gives himself. These sons, the dattaka and the rest, should be known to be equal, according to another Smriti. Sahodhaja is the son of a woman married while he was in her womb, and he should be considered to be the son of the husband and to belong to his mother's caste.

20. **" The son deserted for any cause by the father and mother and is taken as a son is the apaviddha."** [2]

The meaning is that he is known as apaviddha (deserted son).

21. **"Of these, the one succeeding, in default of all preceding, gives the pinda and takes the wealth."** [3]

It should be understood, that of the aurasa and other sons mentioned in their order, the succeeding one, in default of the

---

[1] Yajnavalkya II. 132. [2] *Ibid* II. 132. [3] *Ibid* II. 131.

(*a*) According to the Mitakshara the son bought is one who is sold by the father and mother *or by either of them.* But according to this commentator, the mother has no power to sell the son.

preceding, offers the pinda and takes the wealth; when the preceding is alive, the succeeding one should be given maintenance only, as a matter of charity. Likewise, the text of Manu regarding the aurasa: "One alone, the aurasa, is the heir to the father's property; but out of charity, he shall give maintenance to the rest," is illustratively used of all sons, kshetraja, etc. The meaning is that he alone who, being the first, is the heir, takes the entire patrimony, and that he should give to the rest maintenance only, out of charity. As for the special mention of the kshetraja while the aurasa is alive, in the text: "Let an aurasa dividing the paternal wealth, allot to the kshetraja a sixth or a fifth," which is repeated: "The aurasa and the kshetraja sons are the sharers of the patrimony. The remaining ten sons are, in order, the takers of the gotra and of the wealth," the kshetraja here intended is the son of the appointed daughter. If it is asked is he not equal to the aurasa, we say true; and it has been laid down by himself "they are the sharers of the patrimony." Then how is it stated "a fifth or a sixth"; that applies to the property of the father. He being equal to the aurasa son of the maternal grandfather, deserves to take his entire wealth. But he is lost to the father, because he is begotten for another's benefit; and the text of Vasishtha: "The appointed daughter is the third" intends the same. As the appointed daughter is given by her father to another as the soil for raising offspring, the son begotten on her can be called his 'kshetraja' son. He is called the kshetraja son of the begetter also, because of his connection as the purifier of the soil. His equality with the aurasa son in the taking of the father's wealth regards his maternal grandfather; but his inequality in taking shares regards the father. Thus there is no inconsistency. The (allotment of) one-fifth and one-sixth shares is at the option of the aurasa (*a*). In other places also, the option in the allotment of unequal shares should be thus understood. Therefore it is settled that in default of the preceding, the succeeding one takes the wealth. As for the text of Sváyambhuva Manu: "The aurasa, the kshetraja likewise, the dattaka, the kritrima likewise, the gudhotpanna, and the apaviddha, are the six heirs and bandhus. The kánína, the sahodha,

(*a*) According to the Mitakshara the mother is not left to the option of the *aurasa*. The allotment of a fifth or sixth shares depends on the possession of good qualities by the Kshetraja.

the kríta, the paunarbhava, the svayamdatta, and the son by a Sudra woman, these six are kinsmen but not heirs," what is its meaning? The meaning is that the five sons beginning with the kshetraja take shares even when the aurasa is alive; but the kanina and the rest take shares only in default of the preceding. This explains the text of Vasishtha. Likewise Sankha says: "Two shares belong to the father, two to the aurasa, three to the kshetraja and the son of the appointed daughter; and one to each of the rest." Three shares to the kshetraja and the putrikáputra, *i.e.*, a share and a half each. From shares being allotted to the father also, it is inferred that these take shares even though the aurasa is alive, only during the father's lifetime. After him, they have a right to share only in default of the preceding heirs, as laid down in the text of Achárya (Yájnavalkya). As for the other rule regarding the order of succession, that should be understood to refer to the option of the father. But where it is not applicable, the order laid down by Yájnavalkya is the proper one. In this manner also should be explained other texts of a similar kind.

22. To show that all these sons beginning from the dattaka, are of the same caste, he says:

**"This rule has been propounded by me in regard to sons equal in caste. Even a son begotten by a Sudra on a female slave takes a share at his option."** [1]

Having stated 'this rule has been propounded by me (in regard to sons equal in caste)', Yájnavalkya shows that the texts of other Smritis are useful as being applicable to a different subject. That has been already commented upon (in this way): This order of succession to the property applies only after the decease of the father; but where the father is alive, the rule of partition laid down in other Smritis only should be followed (*a*).

23. This he explains. This is the law of partition applicable after the father's death and is explained by us, because it is difficult. He shows the needlessness of explaining the law of partition during the lifetime of the father by the text: "Even a son begotten by a Sudra on a female slave takes a share at the option of

[1]. Yájnavalkya II. 133.

(*a*) Compare Mitakshara Chap. I., Sec. XIII., para. 1. The latter half of the verse is there introduced as laying down a special rule regarding the partition of a Sudra's wealth.

the father" and by the use of the expression 'at the option of the father.'

**"After the father is dead, let the brothers make him partaker of half a share. If brotherless he shall take the whole, provided there are no daughters' sons."** [1]

The term 'half' is to denote a less share. Likewise Brihaspati: "They shall give, after the death of the father, to the brother born of a Sudra concubine some trifle, if he is obedient." Here also the text is intended to refer to one acting in violation of the Sastras.

If he has no brother and if there exist neither daughter nor her sons, he shall take the whole, with the king's consent; for a text of Brihaspati says: "All the property of an heirless person devolves on the king; some hold that it goes to the son of the concubine with his consent." From this very text 'in default of daughter's sons' (it is clear) that the daughter's sons are the heirs even to men of the regenerate classes, in default of sons; this alone is the reason for the rule enjoining the performance of the maternal grandfather's sraddha (*a*).

24. Thus has been declared a special rule regarding the son by a Sudra woman.

Generally, however:

**"The wife, the daughters also, the parents, brothers likewise and their sons, gotrajas, bandhus, the disciples and the fellow-student; of these, on failure of the first, the next in order is the heir to the estate of one who departed for heaven leaving no issue. This rule extends to all classes,"** [2]

Here by 'wife' is intended one who is pregnant(*b*). Accordingly also Vasishtha: "Now, partition among brothers to be postponed until childless wives beget sons." This shows that pregnant women deserve shares. This word 'son' means 'the infant in the womb,' because of the use of the term 'childless.' Though the infant born be a female, she is like the appointed daughter. Accordingly,

---

[1]. Yâjnavalkya II. 134. [2]. *Ibid* II. 135 and 136.

(*a*) To bring in the daughter's son as heir after the daughter, the Mitakshara says that the daughter's son is included in the particle 'also' in verse 136, Chap. II. Yajnavalkya; *vide* Chap. II., Sec. II., para. 6.

(*b*) According to the Mitakshara, the wife (*Patni*) succeeds to the inheritance whether she be pregnant or not at her husband's death; *vide* Mitakshara, Chap. II., Sec. I., para. 39.

Gautama also after saying "or the widow of a childless man," adds: "Or let her wish for the seed." From this, the word 'woman' is indicated to mean a pregnant woman. Daughters] appointed daughters only(a). Likewise the text of Sváyambhuva Manu also intends the appointed daughter alone: "As is one's self, so is one's son; the daughter is equal to the son; how then can another take the wealth, when she, who is his own Atman, lives." She is heir in default of sons because she could produce a son.

The plural (in 'daughters') is to indicate plurality of appointed daughters. The particle 'cha' implies joint connection with wealth at option. The particle 'eva' is to indicate certainty in all places. 'Parents' *i.e.*, mother and father. The mention together of these, because of joint ownership is to indicate that they shall take one by one; although she is referred to by a conjunctive compound, the mother has priority; for it is declared: "The mother shall take the wealth of her childless son; if she also be dead, the paternal grandmother takes the wealth." When one has no issue of any kind, he is called issueless. This alone is its meaning. But if it be urged that there is this text: "The father or the brothers shall take the wealth of a childless person," (we say) that should be understood to apply only where the mother is not alive. How is this text of Sankha (to be explained?): "The property of a childless person deceased, goes to the brothers; in their default, the parents shall take; or the eldest wife." That applies to the uterine brother where the wife and daughter answering to the above description do not exist. In their default, the parents shall take; here, the father takes first, because of the text: "the father shall take the wealth of an issueless man." With his consent, his wife may take. If he does not consent, the eldest wife may take. The term 'eldest' is used in the sense of 'equal in caste.' The particle *va* denotes 'if she is of the same caste.' By this is explained the following also: "If one of the brothers dies childless or enters into another order, his brothers shall divide his wealth, excepting stridhana." The purport of this is that the paternal grandmother takes the wealth of sons among Kshatriyas, etc., in default of their father and mother. Brothers likewise]

(a) According to the Mitakshara it is not appointed daughters only that succeed. Mitakshara Chap. II., Sec. II.

here, 'likewise' indicates manner. 'Brothers' includes all brothers born of co-wives, etc. 'Their sons' (should be understood) as reviously explained. Gotrajas] sapindas, samanodakas and persons connected with the same person or rishi, in their order. Bandhu], maternal uncle, etc. The preceptor, even though not expressly mentioned, is also included, as he is eulogised as a father. Disciple] one whose upanayana has been performed (by him). Fellow-student] one whose upanayana was performed by the same preceptor. Of these, in default of the preceding, the succeeding one takes. The rest is clear.

25. Till now were declared rules of partition having reference to castes. Hereafter are stated rules regarding different orders:

**"The heirs to the wealth of a hermit, an ascetic, and a permanent student are, in order, the preceptor, the virtuous disciple, and the brother-in-holiness and fellow-student."** [1]

Brahmachari] the permanent student is intended. [Brother-in-holiness] one who is related through the same preceptor. Ekatirthi] one who belongs to the same order. The rest is clear. To others in all castes than the Brahmacharin, hermit and ascetic, it should be understood that the rules of partition previously laid down apply by the principle of elimination.

26. **"A reunited brother shall keep the wealth of a reunited brother, and a uterine brother, of a uterine brother; and shall give it away to one subsequently born."** [2]

He is termed reunited who, being separated, again mixes his wealth and lives together with his father or brother, from any reason. If, while the father and the sons are thus living together, the father begets a son, he should also be given a share. If he dies, it should be taken. "The reunited brother, of the reunited brother"; this applies where partition is made according to the mothers, and refers to the after-born son where the father has no property. As for the text of Gautama: "Now, partition among reunited brothers. The property of all deceased reunited parceners goes to the eldest," here by 'the eldest' is certainly meant the father. The father succeeds to the property of his deceased sons who have no uterine brothers and are not reunited with any other brother. That has been laid down in the text:

---

[1] Yajnavalkya II. 137.

[2] *Ibid* II. 138.

"The father takes the wealth of an issueless person." Others take 'eldest' to mean 'the eldest of the brothers.' That deserves to be thought over. The rest is clear. Others here read the following verse taking it to be merely explanatory of the previous text: "The reunited brother and not a half-brother not reunited, shall take the wealth of a half-brother; a uterine brother even if not reunited shall take, and not a half-brother reunited." The half-brother, even though reunited, does not take the wealth, while the uterine brother is alive. The meaning is that the uterine brother, though not reunited, takes the wealth(*a*).

27. The brothers and their sons of the following description should be supported by him alone who takes the wealth.

**"The outcast, his son, the impotent, the lame, the madman, the idiot, the blind and one afflicted with incurable diseases, etc., these should be maintained, excluding them however from participation."** [1]

'His son' certainly denotes the son of the outcast. Madman] one possessed by a devil. Idiot] one always deficient in understanding. One afflicted with incurable diseases] one suffering from irremediably bad diseases, such as leprosy, etc. The particle 'cha' includes the deaf, etc., mentioned in other Smritis. Some say that the mention of the lame, etc., is to illustrate all those who are disqualified to perform agnihotra, etc. That is unsound, for wealth is an object of human endeavour and as even the unlearned, who are not qualified (to perform agnihotra) are yet declared worthy of property; as Gautama says: "The learned parcener need not give to the unlearned, property acquired by him (by learning)" and "the unlearned shall divide equally." Therefore the disinherison of these results only from express prohibition and not from their being disqualified (to perform agnihotra, etc.,) or from their possessing visible indications of heinous sins committed in previous births. The blind and the rest, who are not outcasts, however, have a right to the grandfather's estate. Such is the custom. From the necessary incompetency to receive more than the wealth necessary for their maintenance, this should be understood to be a mere declaration of

---

[1] Yajnavalkya II. 140.

(*a*) According to this commentator, verse 139, Chap. II. of Yajnavalkya is apparently not authentic. But the Mitakshara contains a learned commentary on it. Vide Mit. Chap. II., Sec. IX., paras. 7—13.

By the mention of the husband alone, it is inferred that others such as brothers, should repay (her the property), even though it was taken by them during famine, etc. Duress] obstruction by saying 'you shall not go without paying me now'; some say that it means siege. The rest is clear.

35. Further:

**"Let one give to the superseded wife an equal sum for the supersession, provided no stridhana had been given her; but if given, let him allot a half."**[2]

To a wife over whom a second marriage is contracted, so much money as is equal to that expended on the (second) marriage should be given, if no stridhana had been previously given her. But if it had been given, a half should be given. This should be understood to apply to a wife superseded without a proper cause for supersession. Thus the law of partition has been explained.

36. If one subsequently contests the partition saying 'I am unseparated' then what is to be done? Yájnavalkya says:

**"When the fact of partition is denied, it should be ascertained by the evidence of kinsmen, relatives, documents, separate acceptance of gifts and by houses and lands separately enjoyed."**[3]

When the fact of partition is doubted, it should be established by (the evidence of) gnatis, etc., Gnati] the maternal uncle, etc., Bandhu] the paternal uncle's son and the like; for these are generally middlemen present at the partition; or other witnesses. Document] deed which was executed as evidence of partition. That is laid down by Brihaspati: "A document may be executed by brothers making a partition; or respectable witnesses may be secured by those making a partition to avoid disputes." Or they may attest other transactions in indirect evidence of partition; similarly by separate acceptance of gift and separate enjoyment of house and lands. A'deya] acceptance of gift. 'Separate enjoyment of house and land' means taking separate land, house, &c.

Likewise Nárada: "Separated, not unseparated brothers, may reciprocally bear testimony, stand surety, bestow gifts and accept presents." Thus the separate enjoyment of lands, etc., is stated to be a fact removing doubts about partition.

S. SITARAMA SASTRI.

---

[1] Yajnavalkya II. 147. [2] *Ibid* II. 148. [3] *Ibid* II. 149.

## NOTES OF INDIAN CASES.

**Yad Ram** *v.* **Umrao Singh**, I. L. R., 21 A., 380. The question o benamidar's right of suit is becoming a source of considerable diversity of opinion. The Allahabad and Bombay decisions are in favour of the benamidar suing. The Calcutta High Court is divided, there being decisions both ways. We do not think the decision of the Madras High Court in *Shangara* v. *Krishnan*, I.L.R., 15 M., 267, can be construed to favour the Allahabad and Bombay views. All that was decided in that case was that where the benamidar had sued without objection, the decree in that action estopped the beneficial owner from re-agitating the question either on the principle of representation, or on the ground that he had been put forward, the real owner standing by, as the right person to sue. It seems right to hold, that the real owner should not have a second opportunity of agitating the same matter in a fresh action. But this does not involve, to our mind, the proposition that if in the prior action the defendant resisted it on the ground of "*no title*" in the plaintiff, the court should permit the plaintiff to go on regardless of the objection. In this connection, we may draw attention to an article by Mr. Monnier in Vol. VI, M. L. J., 405. We took occasion to doubt the correctness of Mr. Monnier's view which was that the benamidar was in the position of a trustee for the real owner. It seems to us that the right principle has been recently indicated in a Madras case which was an action for enforcement of a contract in which the defendant raised the objection that the plaintiff was not entitled to sue, because some other persons were also interested in the contract. In actions upon contract, the obligor, it seems to us, is not competent to give evidence that the obligee named is not entitled to enforce the obligation but that some other person is. See *Adaikkalam Chetti* v. *Marimuthu*, I. L. R., 22 M., 326. It stands to reason where the obligee is a benamidar, the obligor is likewise incompetent to show that somebody else was entitled to the benefit of the obligation. But it seems to us if the action is not for the enforcement of any contract, but one where title to property is in issue, as between a benamidar and a stranger, it is competent to that stranger to question the title of the benamidar and the action of the benamidar must fail. The same principles will apply if the question arose between transferor and transferee as between obligor and obligee.

**Ram Dayal** *v.* **Madan Mohan Lal**, I. L. R., 21 A., 425. The question raised in this case is one which we discussed in the critical note on *Ramabhadra* v. *Jagannatha*, I. L. R., 14 M., 78, vide 1 M. L. J., 213.

The conclusion that we came to is in accord with the opinion expressed by the Full Bench of the Allahabad High Court. Because the decree is silent as regards future mesne profits as to which the plaintiff has no cause of action at the date of suit, though he has asked for them, the explanation to S. 13 cannot convert the silence into an adjudication adverse to the plaintiff so as to bar a suit for subsequent mesne profits. We pointed out that the Madras case was hardly intelligible and Chief Justice *Strachey* expresses the same opinion.

**Harlal v. Muhamudi**, I. L. R., 21 A., 454. The ruling of the Bombay High Court in *Virchand Lalchand* v. *Kumaji*, I. L. R., 18 B., p. 48, is accepted and the Madras case *Natesan Chetti* v. *Soundararaja Ayyangar*, I. L. R., 21 M., 141, dissented from by the Allahabad High Court. The language of Art. 111 seems rather to point in favour of the Madras view though principle and analogy make strongly in favour of the Allahabad view. A good deal has been said in support of that view and we are disposed to welcome it notwithstanding the difficulty of making the language suit the interpretation.

**Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshmamma**, I. L. R., 21 A., 460. We have had frequent occasion to complain of somewhat unsatisfactory character of the pronouncements of the Judicial Committee in dealing with Indian appeals. It does seem to us, and we say it with all respect, that the retired Anglo-Indian element which is distinctly inferior to the rest of the constitution of the Committee has had a preponderating voice in the shaping of the decisions of that body by reason of the greater authority naturally conceded to supposed special knowledge. We have often wished in recent years for a change in the constitution of the Board so as to relegate the retired Indian Chief Justices to the mere position of assessors occupied by their predecessers of half. a century ago when they advised the Judicial Committee on all Indian appeals and the Committee delivered their own judgments untrammelled by the authority of the assessors. We look back to the judgments of those days of men like Knight Bruce, Turner, Westbury and Cairns with great satisfaction as models of judicial reasoning and expression. The latter day judgments of that august tribunal have not sustained the ancient reputation. It is, therefore, with a feeling of relief that we took up this masterly judgment of Lord Hobhouse. We cannot regard the conclusion arrived at as otherwise than satisfactory and a vexed question has been satisfactorily solved.

## SUMMARY OF RECENT CASES.

*Mortgage—Competition between equitable mortgagee and subsequent purchaser for value without notice—Negligence in not calling for production of title-deeds.*

**Oliver v. Hinton** [1899], 2 Ch., 264, C. A.

An agent for purchase of certain properties obtained a conveyance without notice of the existence of a mortgage by deposit of title-deeds. He asked for the title-deeds, but on being told that, as they related to other lands of the vendor they could not be delivered, the agent did not ask to see the documents, but was content with a stipulation in the conveyance, that copies of the deeds should be allowed to be taken, and that the deeds themselves should remain in the custody of the vendor and be produced whenever the vendee should call for them. The question was whether under these circumstances the mortgagee was entitled to priority over the purchaser.

*Romer* J. held that the purchaser had been grossly negligent in not calling for the production of the documents and that he could not allow the plaintiff's contention that under the circumstances even if he had called for the title-deeds the vendor would have given some false answer which would have excused the defendants from making any further inquiry concerning them.

On appeal it was contended for the appellants that the Judge having found that they had no *actual* notice of the mortgage should not have decided against them in the absence of fraud or any negligence on their part so gross as to justify an inference of fraud. The Court of Appeal consisting of *Lindley*, M. R., *Sir F. H. Jeune*, P., and *Rigby*, L. J., overruled this contention and held that the observations of *James*, L. J., in *Ratcliffe* v. *Barnard*, L. R., 6 Ch., 652, which seemed to support such a contention were rather widely expressed, and that all that was necessary to deprive the *bona fide* purchaser for value of his priority was to show that he had been guilty of such gross negligence as would make it inequitable to deprive the prior incumbrancer of his priority.

*Parties—Parish Council—Suit to establish right of Inhabitants.*

**Stoke Parish Council v. Price** [1899], 2 Ch., 277.

The Attorney-General is a necessary party to a suit brought by a Parish Council to establish the right of the parishioners to the use of a

well or spring of water. Where such suit is brought by the Council without making him a party, the suit should be dismissed.

*Lease—Construction—Falsa Demonstratio—Clear mistake.*

**Cowen v. Truefitt** [1899], 2 Ch., 309, C. A.

The doctrine of '*falsa demonstratio*' does not apply to a case of misdescription in which from the other circumstances it is clear what the parties really intended to convey. It applies where a description consists of two parts, the one true and the other false,—no matter which comes first and which last—and the part which is true indicates the subject with sufficient certainty. Then the part which is false is according to the doctrine rejected as surplusage. The peculiarity of such cases is that the true portion is unequivocal and applies to only one subject and the false portion is applicable to no subject.

In this case the lessee of the upper storeys of two houses Nos. 13 and 14 was allowed by the lease the use of the stairs of house No. 13. But as a fact there was no staircase in No. 13 and from the date of the lease, the lessee was using the back stairs of No. 14. It was held that the case was not one to which the maxim "*Falsa Demonstratio non nocet*" applied but that the intention of the parties being clear the document should be rectified so as to allow the lessee the use of the stairs of house 14 which he had till then been using.

*Vendor and Purchaser—Leasehold—Lessor's consent—Default of vendor in obtaining consent—Damages, measure of.*

**Day v. Singleton** [1899], 2 Ch., 320, C. A.

The question in this case was whether a purchaser of leasehold property which the lessee could not sell without the permission of his lessor was entitled to claim over and above the return of his deposit with interest and expenses, any damages for the loss of bargain brought about by the vendor's omission to do his best to procure the lessor's permission. In this case the vendor died and his representatives in order to get rid of the action upon the agreement to sell, procured the lessor to refuse his consent. The purchaser then amended the action by claiming damages for the loss of his bargain.

In the first court *Romer*, J., considered the case as falling within the rule in *Bain* v. *Fothergill*, L. R. 7, H. L. 207, and gave judgment to the plaintiff for the amount of his deposit and interest and the expenses incurred in expectation of the sale.

On appeal *Lindley*, M. R. and *Sir F. H. Jeune*, P., in reversal of judgment held that the rule in L. R. 7 House of Lords was applicable only when the sale went off without the vendor's default, and that when the vendor can procure assent but will not, he is liable not only for damages to the extent of the return of deposit interest and expenses but also for the damages in respect of the loss of bargain.

---

*Mortgage—Further charge—Joint mortgagees—Notice to one of the existence of intermediate charge—Tacking.*

**Freeman v. Laing [1899], 2 Ch., 355.**

In this case certain properties were originally mortgaged to three persons jointly, and subsequently a further charge was created in favour of the same persons. But between the date of the mortgage and that of the further charge, another mortgage upon the same properties had been created to secure an advance by a third person, of which mortgage one of the three joint mortgagees was aware having acted as solicitor to one of the parties. The question was whether the joint mortgagees, all or any of them were entitled to tack the amount of the further charge or any portion of it to the first mortgage and recover in preference to the intermediate mortgage. It was held by *Byrne*, J., that the joint mortgagees could not be said to have each a right to any specific portion of the mortgage money and that the notice of the intermediate mortgage to *one* of the joint mortgagees was enough to prevent the right of tacking and postpone the whole of the further charge to the equitable mortgage.

---

*Secret underground Trespass—Fraud—Limitation—Champerty.*

**Bulli Coal Mining Company v. Osborne [1899], A. C. 351, P. C.**

This was an appeal from the Chief Court of New South Wales. Two important questions arose in this case, (1) whether, when between the years 1878 and 1880 the appellants wilfully and secretly trespassed upon the respondents' mines and removed some coal therefrom and the lessees of the latter under a lease of 1893 for the first time discovered the underground trespass, a suit by the respondents in 1895 for the recovery of the value of coal abstracted from their mines was barred by the statute of Limitations; and (2) whether an agreement between the respondents and their lessees by which it was stipulated that the lessees should bear the expenses of the litigation and receive $92\frac{1}{2}$ per cent. of the profits, in any way affected the respondents' right to recover the profits.

The Chief Judge of the Court of Equity before whom the case was tried in the first instance held on the first point that the statute of Limitations did not bar the suit, and on the second, that the agreement between the lessors and the lessees, though champertous, did not stand in the way of the respondents recovering in the suit, but that the costs should be disallowed as the result of allowing them would be to give effect to the champertous agreement.

On appeal the Chief Court of New South Wales affirmed the judgment except as to costs which they were disposed to allow. They observed that at the time of the lease in 1893, both the lessors and the lessees were under the mistaken impression that the mines were in a state of nature, that therefore if the lessees had chosen they might as soon as they discovered that the mines had been worked in part, have got the lease cancelled on the ground of mutual mistake, and that under the circumstances, there was nothing wrong either in law or in equity in allowing the lessees to take a share of the profits which would have been rightfully theirs if the coal had not been removed. They therefore held that the agreement was not champertous and allowed the respondents' appeal as to costs. From this was preferred the present appeal to the Privy Council.

In the appeal the point as to the champertous nature of the agreement was not pressed and the Privy Council intimated that they saw no reason to differ from the opinion of the Chief Court. On the point of limitation it was urged for the appellants that the Statute of Limitations applied as much to Courts of Equity as to those of law and that mere fraud and wilful trespass would not furnish an answer to a plea of statute unless there was further proof that the trespassers actively concealed the trespass from the person defrauded. The Committee, on a consideration of all the authorities, held that though the Courts of Equity were said to be within 'the spirit and meaning' of the Statute and had uniformly adopted its rules as supplying them with a convenient standard of due diligence which they always required of their suitors as a condition of relief, they never allowed the plea of statute in cases of concealed fraud so long as the person defrauded was ignorant of it without any fault of his own.

*Criminal Jurisdiction—Procedure—Supreme Court at Gibraltar—Morocco Court—Trial by Jury.*

**Spilsbury v. Regina** [1899], A. C., 382, P. C.

In a criminal case in which both the Consular Court of Morocco and the Supreme Court of Gibraltar had jurisdiction, the Court of the

Queen's Bench arrested the prisoner in London and sent him to Gibraltar to be tried by the Supreme Court there. The question was whether as incident to this order directing his trial at Gibraltar, the trial of the prisoner was to be conducted in accordance with the procedure governing the Supreme Court of Gibraltar.

The Supreme Court was of opinion that the procedure should be that prescribed by the Morocco Order in Council and that therefore the prisoner should be tried not by a jury as required by the rules of Gibraltar but by the judge with or without assessors as required by the Morocco Order in Council.

On appeal to the Privy Council the order of the Supreme Court was sought to be supported on the ground that the jurisdiction of the Gibraltar Court arose under Sections 4, 11 and 19 of the Morocco Order and that the jurisdiction so conferred upon it should be exercised not in accordance with the Gibraltar Order which did not create the jurisdiction, but in accordance with the Morocco Order in Council. The Committee held that unless there was some order expressly prohibiting the court from doing so, the ordinary rule that the person to be tried for a criminal offence should be tried according to the procedure of the court in which he is tried, should prevail and that there being no such express prohibition in this case, the prisoner should be tried by a judge with a jury.

*Bond—Construction—Recital.*

**Australasian Joint Stock Bank *v.* Bailey** [1899], A. C., 396, P. C.

In 1887 the respondents and others interested in a certain association gave a continuing guarantee for over-drafts by them to the extent of £2,500, interest and charges. Two years later the respondents again, with others gave a joint and several bond in the penal sum of £4,000 providing that the bond should become void if the association or their sureties paid the amount due on the current account and that the liability of the sureties should not extend to more than £2,000 interest and costs. The terms of the condition and the phrases used, such as "all moneys whatsoever," "in any manner whatsoever become indebted," etc., showed that the bond was intended to secure not merely the money advanced in excess of the amount secured by the guarantee, but all moneys whatsoever advanced by the bank. It was, however, contended that though the terms of the condition were thus widely expressed, the recital clearly indicated that their intention was

to limit it to the balance of debt after deducting the amount guaranteed. The recital was to the effect that the association "*in addition to the sum of* £ 2,500 *interest and charges secured by the guarantee* are desirous of obtaining advances" and that in order to persuade the association to make the advances "it has been agreed that all the debts, interest and liabilities *thence* to arise shall be secured by the above written bond."

In reversal of the decision of the majority of judges of the Supreme Court of New South Wales, the Privy Council held that there was nothing in the recital so inconsistent with the rest of the document as to make it clear that the condition of the bond must be taken in a qualified sense, and that the bond was intended to and did secure all moneys due on the account current to be made up from the books of the bank.

## JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks receipt of the following publications:—

The Law Students Journal for December 1899, (*in exchange*).
The Law Students Helper for December 1899, (*in exchange*).
The Lawyer, (*in exchange*).
Sind Sadar Court Reports, Vol. 1., No. 5 (*in exchange*).
The Bombay Law Reporter for December (*in exchange*).
The Albany Law Journal for December (*in exchange*).
The Calcutta Weekly Notes for December (*in exchange*).
The Allahabad Weekly Notes for December (*in exchange*).
The Green Bag for December (*in exchange*).
The Canadian Law Times for December (*in exchange*).
The Educational Review for December (*in exchange*).
The Canada Law Journal for December (*in exchange*).
The Kathiawar Law Reports for December (*in exchange*).

*The New Year Honors*:—Madras never used to occupy a prominent place in the Honors' Gazette; and even where Madras was honored, the Native Community very rarely came in for an adequate share. Madras has been singularly lucky this year in two of her worthiest sons being selected by Her Majesty, The Queen Empress, for special distinction. No more conspicuous names could be conceived in this Presidency than those of Sir S. Subrahmanya Aiyar and of Sir V. Bhashyam Aiyangar. The one has already achieved by his judicial labours a reputation second

to that of no other judge in the land. By his learning, his character, his large heart and philanthropy he has won the admiration of the profession and the public. The other has by his singularly subtle intellect and legal astuteness carved out a position for himself unique in the history of the profession in this Presidency. The honor conferred upon him is an honor to the profession to which he belongs, specially to that branch of it which by his unexampled success he has raised greatly in public esteem. We trust that the recipients of these honors may live long to enjoy them and the confidence and esteem of the community of which they are ornaments.

***

*Court Room Oratory.**—Before the speaker of this occasion has proceeded very far with the address of this occasion, it will have been quite clearly revealed to you that what he knows about oratory must have been derived from history and observation and that it is at best in a very slight degree due to experience. Indeed, to the observations of your speaker in times past are due the few suggestions which, in the form of recommendation, will be submitted for the consideration of the younger members of the profession especially; for your speaker feels safe in assuming that the veterans in this service, those who constitute the "Old Guard," those whose oratorical habits are confirmed, are "past all surgery."

You are not to infer from the title of what promises to be a rambling talk this afternoon, that there is a species of oratory peculiar to the court-room. The oratory which is successful in the pulpit, upon the platform, and in the legislative hall, is very likely to be successful in the court-room. That is, with slight qualifications, there is but one kind of oratory. The speaker, who can stir your hearts, who can convince your judgments, who can make you accept, adopt and act upon his view of the subject under discussion, is an orator. The speaker who can simply entertain and amuse you by his eloquence may be an accomplished and pleasing declaimer, but he is no orator.

To illustrate the fact that pulpit oratory would be effective in the court-room, and court-room oratory would be effective in the pulpit, I may cite the case of a distinguished divine of the city of Baltimore; distinguished for his consecrated service in the cause of the Master; distinguished for his eloquence in the pulpit. He had been theretofore

* Extemporaneous address by Hon. S. N. Owen before the State Bar Association of Ohio.

for a number of years a successive practitioner of the law, celebrated for his court-room oratory. He was frequently accustomed to allude to the court-room as a very valuable oratorical training school for him. On one occasion, becoming enthusiastic with the subject, he said to his congregation: "You, my brethren, are my jury; my Lord and Master is my client; I feel that His cause is just; and I ask you to hear me patiently in what I have to say in defence and support of that cause; and when I shall have concluded, I shall surely expect your unanimous verdict."

An introduction to an argument is an absurdity. If the so-called or intended introduction deals with the subject of the argument, it is a part of it. If it does not so deal with the subject of discussion, it had better be passed by altogether. It is painful many times to see a fairly good lawyer and reasonably pleasant speaker exhaust himself, if not the court and jury, upon an introduction—what he conceives to be an introduction—in which he proclaims what he is going to talk about after a while; leaving himself very much in the condition, to use a familiar illustration, of one of those Mississippi river steamboats, those flat-bottomed, stern-wheel contrivances. It is said of them that they are nearly all whistle, and when they are about to depart from a port, they give out a blast that arouses the echoes from the woods, the fields and the shores—proclaiming that they are about to start! They tell us that the consequence is that it takes so much steam to run the whistle that there isn't enough left to run the boat! (Laughter.)

There is no more important part of an argument in the court-room than the statement of the case. The advocate succeeds best who in the statement of his case impresses the court and the jury with the justice of his cause;. that imparts to the court and jury an impression that somehow he ought to win that case. The first thing a wise lawyer will do as an advocate is to see that an impression like that gains firm lodgment in the breasts of the triers. You should know that the judge is almost universally training his thoughts in a line that leads to just results.

But, it may be suggested, suppose you are defending against that sort of a case, then what? Well, if you expect to prevail against a case that has inherent justice, equity and merit behind it, it must be by reason of some over-mastering principle of law; and so the wise thing to do is to impress upon the court early the strength of that legal proposition upon which the defence must rest.

It has been well said that a case well stated is half tried. It would not be wholly inaccurate to say that a case well stated is half won.

Avoid chronology in the statement of the facts of the case. By that is meant that a methodical and orderly statement of the facts, in the order of their occurrence, leading up to their controversy, is a systematic waste of time, in the absence, of course, of a preliminary statement of the legal propositions involved in the controversy, and underlying the facts which are stated. For instance: "If the court please, the question in this case is: 'Can a personal representative bind his estate by giving a promissory note, in his representative name and capacity?' We say that he cannot so bind the estate. Our adversaries maintain that he can." Or, "The question in this case is; 'Can a debtor, or does a debtor, by giving his note to his creditor for the amount of his account, pay and satisfy that account?' We say that he does not, without an express agreement to that effect; our adversary maintains, that the giving of a note under such circumstances pays, satisfies, discharges, and for ever extinguishes the account, and the account thereafter has no existence. That is the question."

Having made a brief, clear statement of the question involved, you may safely revel in chronology; because then the mind of the judge is trained upon the vital question and he is applying to it the facts which you state to him; otherwise, such a statement of the facts of the case is as instructive, as interesting, and just about as entertaining as the exposed extremity of a telephonic interview. (Applause.)

Avoid in your argument all attempt at witticism. If there is one serious suggestion in the impending address, it is right here—avoid every attempt at witticism. Crack no jokes; tell no funny stories in the argument of the case to court or jury. You will by your fun and levity undoubtedly entertain the jury—possibly the court; but that is not what you are there for. By your brilliant flashes of wit, and by your delightful humor, and by your really good stories—and they are the dangerous ones—you will excite an expectation in the jury for more fun after a while, and they will be impatiently waiting for something funnier still further on; while it is to the doubtful questions, the questions that need clearing up, that you should address yourself; and you should by your own seriousness impress the jury that to you and to your client that case is a matter of grave and serious concern.

The lawyer who achieves a reputation for being a funny man is doomed, so far as his advocacy is concerned; just like the sensational preacher is doomed when he has achieved the reputation of being sensational. He may build up congregations, but he will never build up churches—never did. You may win the applause and secure the verdict.

of that unsworn jury that sits without the bar; but when that sworn jury retires to the jury-room to consider your case, it will be the weightier matters and not the "mint, anise and cummin" of the case that will engage their thought.

History, perhaps, Mr. President, affords no better illustration of this subject than the case of the two rival orators of Greece in the palmy days of Grecian oratory. You will remember—some of you may have forgotten—that Philip of Macedon succeeded in making it very uncomfortable for the Greeks by cutting off access to their ports of entry, and other annoyances. This gave rise to two parties. One was in favor of making peace with Philip, and the leader of this party was that most accomplished declaimer who ranks in history as an accomplished orator, Æschines. There was another party quite as formidable, whose leader was Demosthenes, in favor of war with Philip; a war of extermination if necessary. So on an occasion after Æschines had addressed his partisans, indulging in wit and humor and pathos to a most remarkable degree, in favor of peace with Philip, when he had concluded his hearers with one voice said: "What a magnificent oration; what sparkling, ready wit; what delightful humor: what moving pathos!" But nobody was heard to say; "Let us make peace with Philip." But when the great Athenian had concluded one of his masterly philippics against the proud, aggressive Macedonian prince, with no disposition to indulge in, no genius for, wit and humor, but pressing home upon his hearers the necessity of war to the bitter end, nobody was heard to say: "What a magnificent oration!" Nobody was heard to say: "What an accomplished orator!" But with one voice his followers exclaimed; "Let us go and fight Philip. Let us conquer or die!"

A more modern instance will further illustrate the subject. During the first half of the present century, a case came on for trial in one of the country courts in the interior of Massachusetts. The jury had been sworn. An elderly gentleman, plain, quiet, unassuming sort of a man, came in and took a seat at the counsel table. He was a stranger to the twelve jurors. When the argument in the case was reached, it was opened for the plaintiff by local counsel. He was followed by the orator of the county, and he out-did himself in his wonderful presentation of that case. He anticipated the advent of this elderly gentleman to take part in the trial. He set the court-room in a roar; his wit, his humour, his pathos—were simply overwhelming. He won the applause of all present—even the jury! When the plain, elderly gentleman came to close the case, in a conversational way, making himself familiar with

the jury, he proceeded to tear down the arguments of his adversary, to demonstrate to that jury in his plain way the strength of his own case. When the jury retired of course the unanimous expression of the jurors was that the young fellow had made the grandest plea—plain people call arguments "pleas"—the greatest plea they had ever heard. "Yes, that is true," said the foreman, "but then I liked the way that old chap that talked last explained the case." "Yes," said another, "and I think he is right about it. He is not much of a lawyer, never would be if he practised fifty years; never could make a 'plea' like that young fellow; but it seems to me he has got the right of this case;" and the verdict was given him. Little did they know that that "old chap" was the elder Parsons; than whom few more accomplished lawyers ever stood in any court room to speak for his client. Now, which had you rather have, the applause and approval of the jury for your magnificent oratory, or the verdict that that "old chap" gathered in? (Applause.)

It is a very common error, many times a fatal one, to assume and even say that you "assume that the court knows the law;" "of course the court is familiar with the law in this case." Well, you had better, and you will if you are wise, assume that the court is densely ignorant of the law of your case (applause), and then proceed to enlighten the court upon the law of your case; for if it so be that the court does know the law of your case, all right, no harm is done; and if the court does not, you may by your fatal confidence lose your case; whereas if you would enlighten the court as you should, victory would be yours. You have devoted weeks, it may be, to the law peculiar to your case, while to the court it may all be new.

In your argument, you may, especially in reviewing courts, and more especially in courts of last resort—you may encounter questions from the bench. Few things are easier for a judge than to ask questions of counsel during the argument. Few things would be harder for him than to answer all his questions correctly. (Applause.) It has occurred to your speaker in his judicial service in past days, after having surrendered to an inquisitive impulse, that it was fortunate for the inquisitive judge that there is nothing in the constitution or statutes requiring him to answer his own questions. (Applause.) It is true there are many proper questions which may fall from the bench; for instance, concerning some controlling fact in the case, or something concerning the state of the record. Such a question you should always be prepared for; and if you cannot answer it, it is because your client has hired the wrong lawyer; but when a sort of legal catechism is entered upon by one of the judges, don't at the peril of your case undertake to answer him, unless you are very sure that you are prepared conclusively to answer the question so as to silence all cavil upon that subject.

It is well enough to promise the judicial inquisitor that after a while you will answer that question, and are thoroughly prepared for it. By the time you have concluded, it is likely the judge could not, if put to the rack, recall the question, and will probably have forgotten it altogether.

Keep your temper during the argument of the case, whether you or the adverse counsel is arguing; just keep your temper. If temper must be exhibited, if somebody must get mad during the argument of the case, by all means let it be the gentleman—or the lady—on the other side of the counsel table.

Now, ladies, please don't accuse, nor even suspect your speaker of supposing impossible conditions in order to illustrate his point. Not many years ago a lady lawyer—for she was both a lady and a lawyer—came into the court of last resort of this State, and alone, against three of the ablest male lawyers in the State, presented and argued her case—and she behaved like a gentleman, too. Now, what is meant by that is, that she fought fair and won her case, not because she was a lady and the judges were men, but because after thorough preparation, a thing indispensable in every case, she was able by a dignified statement to demonstrate to those five cold-blooded judges that the courts below had erred to the fatal prejudice of his client.

So, returning from a somewhat lengthy and complicated parenthesis —if somebody must be mad, let it be the gentleman or the lady on the other side of the counsel table. It may be well enough to suggest that you have observed—if it is the other one that is getting mad—that a lawyer usually begins to lose his case and his temper about the same time. He may get madder yet, or it may make him good natured—in either case the victory is yours.

Never apologize for an argument under any circumstances or conditions. Please don't forget that. Never let the court or jury—or your client—know or suspect that you are not doing your very best all the time. The argument, or the address, or discourse of any kind, which requires an apology ought never to be delivered. If the performance is or promises to be one which calls for an apology, it is too long at best—don't you see?—and it is weakness, no, it is wickedness to prolong its wretched life with a miserable apology. Do not antagonize the court. Adverse counsel will furnish you employment without going up against a hostile court.

Having quoted Latin to the judge, it is a thing at best of debatable propriety to translate it for him into English. Besides, it is an unne-

cessary reflection upon the classical and literary accomplishment of the judge. If your suspicious that that judge will not know what your Latin means are well founded—why, English is good enough for him.

As to the length of an argument: of course there is no iron rule to guide counsel upon that subject. Some lawyers seem to talk to rest their brains; some lawyers seem—now, please don't suspect the speaker of originality in this statement—some lawyers seem inspired by an ambition to make their speeches immortal by making them eternal; but keep in mind always that an argument which, throughout its delivery, thoroughly interests, instructs and entertains the court and jury, cannot within the limits assigned it, very well be too long; the argument which does neither cannot very well be too short.

Charles Dickens in his "Pickwick Papers" put into the mouth of Sammy Weller, during that profound philological discussion between Sam and his father, old Tony Weller—"the governor," as he called him—some philosophy concerning letter-writing which might also find appropriate application to an argument in court, or any other sort of address or discourse. You will remember that while they were concocting that immortal valentine—it was a brief one—Tony Weller, the old coachman, thought it was too brief, that the conclusion was rather abrupt; so he suggested to Sammy: "Rather a sudden pull up, ain't it, Sammy?" Then Sammy perpetrated this flash of philosophy: "Governor, the way to write letters is to write 'em so that when they've read 'em they'll always wish there was more!" It seems to your speaker that it would many times be wise to apply that philosophy to speech-making—especially to court-room arguments.

But, young gentlemen, after all, nothing contributes so powerfully to the success of court-room oratory as a pure life! Let the court and jury come to suspect that you have a serious impediment in your veracity; in other words, let them once lose confidence in you as a man, in your word and in your sincerity, and you might just as well sit upon the counsel table and fiddle for that court and jury as to talk to them. No matter how profound, no matter how sound, no matter how logical, no matter how powerful otherwise your argument may be, it will be vain: and your adversary, if he be a man in whom the court and jury have confidence, who has so deported himself in his practice that they believe him to be an honest, sincere and truthful man, has a vast—it may be an overpowering—advantage of you.

So, my friends, from a field almost boundless in its proportions—rich in its resources, a few sheaves have been gathered at the hands, it

may be, of an awkward gleaner, and laid at your feet. If your speaker has been able, by his presentation of these few branches of a subject so vast, to instruct without wearying you, to entertain without offending you, his highest ambition for the occasion ought to be, and you may be sure it is, abundantly appeased.

You see how impossible it is to traverse the entire field of oratory of the court-room in a single address.

Nothing is more important, unless it is the introductory statement of an argument, than its conclusion. One of the richest and rarest gems of court-room oratory is an artistic conclusion. Say the things which you deem the subject calls for. Omit the unnecessary and the doubtful things. Unnecessary things are vicious; doubtful things are dangerous.

You may encounter an extremity sometimes when you feel there is some statement you ought to make, something which the court and jury ought to hear, and you hesitate for fear it may give offence to somebody. You may do well to remember that it is not in the clear open field of forensic combat, but it is in the narrow passes of professional warfare that your metal is to be tested. You may encounter an occasion, if you have not already, where you feel that your high duty as counsel and as advocate calls upon you to make some statement that has so far been withheld. It may be well in such extremity to take counsel of the words of that wise and brave man who said:

"Speak! no matter what betide thee;
Scorn the dungeon, rack and rod;
If a free thought seek expression
Speak! and leave the rest to God!"

(Applause.)

Having then said these things which the subject and the occasion call for and require, having said them as acceptably as you may, dealing with the salient, the strong, the vital points in your case, after thorough preparation, then achieve as you may the proudest and richest trophy of court-room oratory, and, imitating in this one thing the example of your speaker, simply quit.—*The Albany Law-Journal.*

***

*Right of Privacy*:—In the recent decision in Atkinson *v.* John E. Doherty & Co., heretofore referred to in these columns, the Supreme Court of Michigan took somewhat radical ground against the so-called right of privacy. The action was brought by the widow of Col. John Atkinson, for an injunction against the defendants to prevent the con-

tinued use in their business of her husband's name as a trademark for the sale of cigars. The defendants were selling a brand of cigars which they advertised as "The Col. John Atkinson Cigar," and they also put them upon the market under a label bearing the name and a likeness of Col. John Atkinson. The Michigan court, in deciding against the claims of the plaintiff, used the following language:

We are not satisfied that the homes and landscapes are so entirely within the control of owners that one commits an unlawful invasion of the rights of privacy in looking upon their beauties, or by sketching or even photographing them, or that one has a right of action either for damages or to restrain the possessor of a camera from taking a snap shot at the passerby for his own uses. If we admit the impertinence of the act, it must also be admitted that there are many impertinences which are not actionable, and which courts of equity will not restrain. As the right alleged is not a property right, and does not spring from any contract, it must follow that relief must be in an action for damages for a breach of duty upon an actionable wrong, or a suit to prevent a threatened injury. In either case such action must be based upon an act done or threatened which the law looks upon as a tort; and, if the act complained of is one which is not in the law denominated a wrong, there is no legal remedy. All men are not possessed of the same delicacy of feeling, or the same consideration for the feelings of others. These things depend greatly upon the disposition and education. Some men are sensitive, some brutal. The former will suffer keenly from an act or a word that will not affect the latter. Manifestly, the law cannot make a right of action depend upon the intent of the alleged wrongdoer, or upon the sensitiveness of another. Although injuries to feelings are recognized as a ground for increasing damages, the law has never given a right of action for an injury to feelings merely. Slander and libel are based upon an injury to reputation, not to feelings; and, although many offensive things may be said that injure feelings and shock and violate the moral sense, even though they be untruthful they are not necessarily actionable. To make them so they must be of such an atrocious character that the law will presume an injury to reputation, or special damage to property interests must be alleged and proved. What becomes of the innumerable cases of ill natured and perhaps insulting and immoral things that may be said about persons? The answer is that in an enlightened effort to preserve the liberties of man, upon the one hand, and to prevent invasion of their liberties, upon the other, it has been found that a line of demarkation must be drawn which affords a practical balance and satisfactory test of liability. Mr. Bishop, by his "Diagram of Crime," has made plain the fact that there are many wrongs against the public that are not indictable because too small for the law to notice (I Bish. Cr. Law, sec 600). The same is true of private wrongs. Hence, that which would be slanderous *per se* if said in the presence of a third person is not actionable if addressed to the object of the remark, in

private. The law does not discriminate between persons who are sensitive and those who are not, and the brutality of the remark makes no difference. Yet the alleged "right to privacy" is invaded. The wisdom of the law has been vindicated by experience. This "law of privacy" seems to have obtained a foot hold at one time in the history of our jurisprudence—not by that name, it is true, but in effect. It is evidenced by the old maxim, "The greater the truth the greater the libel," and the result has been the emphatic expression of public disapproval by the emancipation of the press and the establishment of freedom of speech and the abolition in most of our States of the maxim quoted by constitutional provisions. The limitation upon the exercise of these rights being the law of slander and libel, whereby the publication of an untruth that can be presumed or shown to the satisfaction, not of the plaintiff, but of others (*i.e.*, an impartial jury) to be injurious, not alone to the feelings, but to the reputation, is actionable. Should it be thought that it is a hard rule that is applied in this case, it is only necessary to call attention to the fact that a ready remedy is to be found in legislation. We are not satisfied, however, that the rule is a hard one, and think that the consensus of opinion must be that the complainants contend for a much harder one. The law does not remedy all evils. It cannot, in the nature of things; and deliberation may well be used in considering the propriety of an innovation such as this case suggests. We do not wish to be understood as belittling the complaint. We have no reason to doubt the feeling of annoyance alleged. Indeed, we sympathize with it, and marvel at the impertinence that does not respect it. We can only say that it is one of the ills that, under the law, cannot be redressed.—*The Albany Law Journal.*

***

*The Teaching of Law at Harvard*:—The Contemporary Review of November last contains a very interesting article on the 'Teaching of English Law at Harvard' by Professor Dicey. The whole article is well worth perusal especially in view of the interminable discussions which are going on as to the constitution and method of teaching at the Madras Law College. Professor Dicey bestows very high praise on the system of instruction persued at Harvard. He says that "the Law School forms a sort of University within the University. Its library constitutes the most perfect collection of the legal records of the English people to be found in any part of the English speaking world. We possess nothing like it in England." * * * "But it is in its students and its Professors, in its crowded lecture rooms and its admirable teaching that lies the true glory of Harvard."

The Professor then proceeds to say 'that the most salient and original feature in the Harvard method of instruction is that tuition is in the Law School grounded upon the study of cases, and is in its

form catechetical. The way in which this system works is curious. Suppose a student utterly unacquainted with law, as are most young men when they enter the Harvard Law School, to be an attendant at Professor Ames's Lectures on the Law of Contract. From the first moment he joins the class he has placed in his hands the huge collection of contract cases edited by Langdell. The cases are placed under different heads, as for example, under "offer and acceptance" and under each head are arranged in historical order. Our student is neither assisted nor confused by printed comments. He is left without the aid even of head notes: he knows that he must prepare for the lecture or as it is sometimes aptly called 'exercise.' Say the first nine or ten cases in the book. He reads, I presume in some book on the Law of Contract the chapters bearing on the topic in hand. He then comes with from 100 to 200 companions to the lecture. Professor Ames has the names of the students before him. He calls now upon one, now upon another, to state the result of a definite case. He asks questions about it; he suggests in the way of question variations on the case; he states in the form of observation its real gist. This plan of plunging a pupil at once into a mass of cases seems when one first hears of it, a hopeless one. As a matter of fact, its success in the hands of a master such as Professor Ames, is patent. It is the Socratic method applied to law and is infinitely stimulating. The whole class are kept alive. Foolish answers or impertinent answers and, of the latter I heard none whatever, are checked by the capacity of the teacher and the opinion of the class. No man willingly plays the fool before his class-mates. What to me was more surprising was the way in which skilful catechetics not only exhausted every case but brought out the general principle which the cases or set of cases illustrate."

"The proportion in which current dissertation ought to be mingled with questions must be regulated by the nature of the topic to be taught and in accordance with the judgment of the teacher * * * and this system (of question and answer) as conducted by lawyers of eminence has two special merits. In the first place, it forces young men to rely on their own efforts rather than let themselves be taught and must be a great preservative against cramming. It gives the students at Harvard much the same kind of stimulus which is felt by a young man when he begins to read for the Bar, and having entered chambers is called upon for the first time to draft a claim or write an opinion. The claim is drawn wrong and the opinion is worthless but the student's effort to obtain knowledge by applying his mind to the solution of a given case is worth more than scores of lectures.

The Harvard system in the next place calls into play the disputatious instincts of the whole class. Great, indeed is the value of the art of contradiction. Young men learn more from wrangling than from reading. The problems of the lecture room turn into the disputes of the boarding house and points of law are discussed with the eagerness and with the ignorance with which in Oxford, some 40 years or more ago, young men used to discuss, as I trust they still do discuss, problems raised by the Ethics or the Politics of Aristotle."

* * * *

It is what a student thinks and talks about outside the class room for more than what he hears in lecture which gives him his true education: and for the success of the Harvard method it is essential that students should be perpetually engaged in the examination and discussion of cases. This end is achieved by the encouragement of two institutions, both characteristic of Harvard.

*First.*—The Law Club and the Moot Courts. Law clubs are the creation of students though they are favored by Professors. The Moot Court is a University institution. It is a meeting at which the whole Law School is assembled and whilst a Law Professor sits as judge young men generally in their third year argue some difficult point of law in the manner which would be required of a barrister when appearing for instance before Supreme Court of the United States. In the Law Schools throughout the union there Moot Courts exist and care is taken to train young men in every kind of argument in which when they begin to practise they may be called upon to take part. At the Boston Law School for example—I heard two young gentlemen make an application for amendment of pleadings. Nothing in its way could be better. The truth is that whether in the clubs or in the Moot Courts young men gain an amount of practical training which must be invaluable and the want whereof hampers every English Barrister however able or learned when for the first time he has to address a real jury or argue before a real judge. But the practical advantages obtained from the Law clubs and Moot Courts sink into nothing compared with the benefit which these institutions confer upon students by kindling ardent interest in legal problems.

*Secondly.*—The Harvard Law Review.

If the law clubs stimulate debate the Review encourages learning. Its pages contain admirable work by the ornaments of the American Bar and the American Professoriate. But the whole Review is known to all Englishmen interested in legal education. Few of us are aware that this

important periodical is managed by the students of the law school. Admission to the editorial body consisting of some 16 or 17 persons is an object of natural ambition to the elder students. To take point in the work of editing is one of the best occupations of men in their third year who having reached the age of about 24 or 25, have advanced far on the road towards the acquisition of sound knowledge.

The constant and scientific study of cases under the guidance of eminent lawyers, practice in the law clubs or Moot Courts, assiduous labour in the editing of the Law Review, these are the means by which the teachers of Harvard keep alive the vivid interest of students in the problems presented by the living law of England and America. Hence their splendid and undoubted success.

---

## NOTES OF AMERICAN CASES

The failure of the payee of a check promptly to present it for payment is held, in Hamlin *v.* Simpson (Iowa) 44 L. R. A. 397, to effect a release of the maker if he is injured thereby, where the bank subsequently fails, although his general deposit in the bank was overdrawn at the time, if he had a special deposit which he had reasonable grounds to believe would be used to pay the check.

***

A broker is held to be the procuring cause of a sale in Hoadley *v.* Savings Bank of Danbury (Conn.) 44 L. R. A. 321, when he called a person's attention to the property and gave him information as to how to obtain admission thereto, although, without his knowledge, the owner subsequently took up the negotiation and completed the sale. An extensive collection of the authorities on the question when a real-estate broker may be considered the procuring cause of a sale is furnished in a note to this case.

***

The pretense by a man that he is unmarried, upon which he procures money from a woman on a promise of marriage is held, in State *v.* Renick (Or.) 44 L. R. A. 266, insufficient to make him punishable for false pretenses through the use of himself as a false token.

***

The murder of a person whose life is insured, committed by an assignee of the policy, whose claim to it is valid only for reimbursement of premiums paid, is held, in New York Life Ins. Co. *v.* Davis (Va.)

the profits, while falsely representing themselves as rival bidders, is held, in Hoffman *v.* McMullen (C. C. App. 9th C.) 45 L. R. A. 410, to be void so that no accounting of the profits can be compelled.

***

A statutory right of a stockholder to inspect the books, documents, and records of a corporation, is sustained in Weihenmayer *v.* Bitner (Md.) 45 L. R. A. 446, even when he is a business rival of the corporation and seeks information to be used to its injury and loss.

***

But in *Re* Steinway (N. Y.) 45 L. R. A. 461, the court, sustaining the common law right of a stockholder to inspect the books of the corporation, goes no further than to say he has a right to inspect them at a proper time and place and for a proper purpose.. With these cases there is an extensive note reviewing the other authorities on the subject.

***

Notes and a deed given to settle a claim against the maker's son-in-law and release him from arrest for felony are held, in Loud *v.* Hamilton (Tenn.) 45 L. R. A. 400, to be valid as against a claim of duress, when the maker entered into the transaction deliberately, after manœuvring for a compromise, and on an understanding with his daughter that the payment should constitute an advancement to her.

***

Threats to arrest a man for embezzlement unless his wife will execute a mortgage are held, in Mack *v.* Prang (Wis.) 45 L. R. A. 407, sufficient to consitute duress which will avoid a mortgage made by her, if the threats were sufficient to control her will; and the case also holds that the defense of duress in case of negotiable paper is cut off by transfer to a bonâ fide holder.

***

A man who has a cold, on account of which he is in bed, is held, in Barnes *v.* Fidelity Mutual L. Asso. (Pa.) 45 L. R. A. 264, to be, nevertheless, "in good health," within the meaning of a clause in a life insurance policy which requires the premium to be paid while he is in good health, although pneumonia sets in, in a day or two after the premium is paid, and proves fatal.

***

An agreement by a member of a building and loan association to insure his life and permit the policy to be used as collateral security for a loan to the association is held, in Tate v. Commercial Building Asso. (Va.) 45 L. R. A. 243, to be void as against public policy.

***

Mere temporary use of a machine for threshing grain for a few hours on the premises where insured property is located is held, in Adair v. Southern Mutual Ins. Co. (Ga.) 45 L. R. A. 204, to be insufficient, *per se*, to cause a forfeiture or suspension of the policy, under a provision that it shall be forfeited by any change which increases the degree of the risk, as the court construes this to apply to changes of a permanent nature.

***

The power of a state court of equity to entertain a bill to set aside a judgment obtained by fraud in a Federal Court is sustained in Wonderly v. Lafayette County (Mo.) 45 L. R. A. 386, where the claim was that the jurisdiction of the Federal Court was fraudulently invoked by false representation as to the citizenship of the parties.

***

A surety who has paid a judgment against himself and his co-sureties on account of the principal's debt is held, in Merchants' Nat. Bank v. Great Falls Opera House Co. (Mont.) 45 L. R. A. 285, to be entitled to an assignment of it as a basis for enforcing contribution from his co-sureties.

***

Payment to a *de facto* officer is held, in Rasmussen v. Carbon County Comrs. (Wyo.) 45 L. R. A. 295, to constitute no defense to an action brought by a *de jure* officer for the salary of an office to which he has been legally declared entitled from the commencement of the term, except when he is himself in default by failure to qualify.

***

A person approaching a railroad crossing at which a train is standing on a side track to receive or discharge passengers is held, in Betts v. Lehigh Valley R. Co. (Pa.) 45 L. R. A. 261, to be not guilty of contributory negligence in failing to stop, look, and listen before attempting to cross the main track, when he knows of a rule of the carrier, requiring a train to stop before reaching a station at which another train is receiving or discharging passengers.

***

A ten year lease of a railroad, which is fair in its terms, is upheld in state, *ex rel.* Nolan, *v.* Montana R. Co. (Mont.) 45 L. R. A. 271, against the contention that it involves an abandonment of the railroad enterprise or violates the constitutional provision against consolidation of parallel or competing railroads or the uniting of their business or earnings. The court holds that railroads are competing when, by their connections, though not entirely by their own lines, they have the opportunity, by their geographical situation, to cut rates to certain principal or terminal points. With this case is a note which reviews and analyzes the authorities on the restrictions on the consolidation of parallel or competing railroads.